Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

YVONNE R. STRIBLING,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I

DID THE DISTRICT AND APPEALS COURTS ABUSE THEIR DISCRETION AND COMMIT REVERSIBLE ERROR IN FINDING THAT RACHELE FLEMINGS' VIDEO TESTIMONY WAS NOT ADMISSIBLE UNDER FEDERAL RULE OF EVIDENCE 804(b)(3) AS A STATEMENT AGAINST PENAL INTEREST?

A.

Did the courts below apply the wrong standard in holding that Rachele Flemings' videotaped statements were not against her penal interest?

B.

Were corroborating circumstances present that clearly indicated the trustworthiness of Flemings' statements?

C.

Did the trial court's abuse of discretion in excluding Flemings' statements constitute reversible error?

II.

DID THE DISTRICT AND APPEALS COURTS ERR IN FINDING THAT YVONNE STRIBLING WAS NOT PREJUDICED BY APPELLATE COUNSEL'S LIES, MISREPRESENTATIONS AND INEFFECTIVE ASSISTANCE?

A.

Did appellate counsel's representation fall below an "objective standard of reasonableness"?

B.

Did appellate counsel, by lying, misrepresenting and pursuing only meritless issues, prejudice Stribling's right to a fair trial with reliable results?

LIST OF ALL PARTIES TO THE PROCEEDING

1) United States of America

2) Yvonne R. Stribling

3) No Corporation is involved.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
LIST OF ALL PARTIES TO THE PROCEEDING	iii
TABLE OF CONTENTS	v
TABLE OF AUTHORITIES	vii
OPINION BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISION AND FEDERAL RULE INVOLVED	1
STATEMENT OF THE CASE	2
I. Facts	2
A. At trial	2
B. On Appeal	6
C. On § 2255 Appeal	7
REASONS FOR GRANTING THE WRIT	9
I. DID THE DISTRICT AND APPEALS COURTS ABUSE THEIR DISCRETION AND COMMIT REVERSIBLE ERROR IN FINDING THAT RACHELE FLEMINGS' VIDEO TESTIMONY WAS NOT ADMISSIBLE UNDER FEDERAL RULE OF EVIDENCE 804(b)(3) AS A STATEMENT AGAINST PENAL INTEREST?.	9

A. Did the courts below apply the wrong standard in holding that Rachele Flemings' videotaped statements were not against her penal interest? 10

B. Were corroborating circumstances present that clearly indicated the trustworthiness of Flemings' statements? 19

C. Did the trial court's abuse of discretion in excluding Flemings' statements constitute reversible error? 22

II. DID THE DISTRICT AND APPEALS COURTS ERR IN FINDING THAT YVONNE STRIBLING WAS NOT PREJUDICED BY APPELLATE COUNSEL'S LIES, MISREPRESENTATIONS AND INEFFECTIVE ASSISTANCE? 23

A. Did appellate counsel's representation fall below an "objective standard of reasonableness"? 24

B. Did appellate counsel, by lying, misrepresenting and pursuing only meritless issues, prejudice Stribling's right to a fair trial with reliable results? 27

CONCLUSION 28

APPENDIX A-1

TABLE OF AUTHORITIES

Page(s)

Constitutional Provision:

U.S. Constitution Amendment VI 24,27,28

Statutes:

18 U.S.C. §1001 (1997) 13,16-18

28 U.S.C. §2255 (1997) 11,26

Cases:

Freeman v. Lane, 962 F.2d 1252 (7th Cir. 1992)..... 28

Gray v. Greer, 800 F.2d 644 (7th Cir. 1985) 24

Lowery v. Maryland, 401 F. Supp. 604 (D.C. Md. 1975)..... 17,18

Mason v. Hanks, 97 F.3d 887 (7th Cir. 1996) 25,27

Sims v. United States, 103 F.3d 133 (7th Cir. 1996) 24

Strickland v. Washington, 466 U.S. 668 (1984)..... 24-27

United States v. Alvarez, 584 F.2d 694 (5th Cir. 1978)..... 12

United States v. Barone, 114 F.3d 1284 (1st Cir. 1997)..... 21

United States v. Barrett, 539 F.2d 244 (1st Cir. 1976)..... 12,14,16

United States v. Benveniste, 564 F.2d 335 (9th Cir. 1977)..... 12,23

United States v. Brainard, 690 F.2d 1117 (4th Cir. 1982) 21

United States v. Doyle, 130 F.3d 523 (2d Cir. 1997) 14-16

United States v. Garcia, 897 F.2d 1413 (7th Cir. 1990) 12,13,20,22,23

United States v. Goins, 593 F.2d 88 (8th Cir. 1979) 18

United States v. Hoyos, 573 F.2d 1111 (9th Cir. 1978) 12

United States v. Layton, 549 F. Supp. 903 (D.C. Cal. 1982) 12

United States v. Moore, 936 F.2d 1508 (7th Cir. 1991) 20,21

United States v. Nagib, 56 F.3d 798 (7th Cir. 1995) 12,13,23

United States v. Oropeza, 564 F.2d 316 (9th Cir. 1977) 12

United States v. Paguio, 114 F.3d 928 (9th Cir. 1997) 12,14,16

United States v. Satterfield, 572 F.2d 687 (9th Cir. 1978) 12,20-22

United States v. Stribling, 94 F.3d 321 (7th Cir. 1996) 24,26

United States v. Thomas, 571 F.2d 285 (5th Cir. 1978) 12-16,19,21,22

United States v. Zapata, 871 F.2d 616 (7th Cir. 1989) 22

Whren v. United States, 517 U.S. 806 (1996) 24

Williamson v. United States, 512 U.S. 594 (1994) 9-13

Rules:

Fed. R. Evid. 804(b)(3) ..... *passim*

PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

Yvonne Stribling seeks review of the Seventh Circuit Court of Appeals' May 13, 1998 Order which is reported as Case No. 97-4102 (A-1). This Order affirmed the United States District Court's Memorandum and Order, and Judgment, (A-6, and A-8), respectively, and reported as Civil Case No. 97-717, denying Petitioner's 28 U.S.C. §2255 motion. Petitioner's §2255 motion was undertaken to vacate or set aside the Seventh Circuit Court's Opinion, reported as *United States v. Stribling*, 94 F.3d 321 (7th Cir. 1996) (A-18), which affirmed Petitioner's conviction in the District Court Judgment reported as Case No. 95-30005. (A-25).

JURISDICTION

On May 13, 1998, the Seventh Circuit Court of Appeals entered its Order affirming the District Court's denial of Petitioner's §2255 Motion. Pursuant to Supreme Court Rule 13.1, this Petition has been filed within 90 days of the entry of the Order.

The District Court exercised jurisdiction under 18 USC §2255. The Appeals Court exercised its appellate jurisdiction under 28 USC §1291. The jurisdiction of the United States Supreme Court is invoked pursuant to 28 USC §1254(1).

CONSTITUTIONAL PROVISION AND FEDERAL RULE INVOLVED

U.S. Constitution, Amendment IV

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Federal Rule of Evidence 804(b)(3)

(b) **Hearsay exceptions.** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness.

(3) Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

STATEMENT OF THE CASE.

I. FACTS

A. At Trial

On September 6, 1995, Rachele Flemings made a series of statements on video to Yvonne Stribling's trial counsel, J. William Lucco, in the library of the law offices of Lucco, Brown and Mudge. (R1, Exhibit 2). The subject of these statements was a car trip Flemings and Stribling made together from California to Chicago on January 11, 1995 which resulted in the seizure of some 30 Kilograms of cocaine from a secret compartment in the vehicle they were driving on an interstate in southern Illinois. As a result of this seizure, Stribling was indicted and eventually convicted for violations of Title 21, United States Code, Section 841(a)(1), and Title 18, United States Code, Section 2. The trial court asserted jurisdiction under 28 U.S.C. §1331 (1997).

Under oath, (R1, Exhibit 2, at 2, & at 4), Flemings' acknowledged that Lucco represented Stribling. (R1, Exhibit 2, at 3). She stated that she was at Lucco's office voluntarily, (R1, Exhibit 2, at 4) giving statements to make a record of what she had told Lucco in the past, (R1,

Exhibit 2, at 4) including at her hotel the day before. (R1, Exhibit 2, at 3).

She stated that Clyde Williams had spoken with her over the phone and told her that he would drop off the car. Flemings explained that she and Williams made arrangements to use the car to come to Illinois, and that Stribling had nothing to do with making the arrangements for the car. (R1, Exhibit 2, at 5).

Flemings, accompanied by her brother Paris, had made two prior car trips from Los Angeles to Chicago for Williams. On those earlier trips, Williams had parked a car at her townhouse and given her the keys. (R1, Exhibit 2, at 11). Stribling had not gone with her on these earlier trips. (R1, Exhibit 2, at 6).

Flemings explained that Paris had been ill and could not make the January 11, 1995 trip. (R1, Exhibit 2, at 11). She therefore asked Ms. Stribling to accompany her. (R1, Exhibit 2, at 11). Stribling was going to Chicago "for other business," (R1, Exhibit 2, at 10) and before the trip, Flemings had twice made arrangements for Stribling to fly to Chicago during that time. (R1, Exhibit 2, at 10). Williams had paid Flemings for the prior journeys and she anticipated being paid for this trip. (R1, Exhibit 2, at 8, & at 9). Stribling was not supposed to be paid for the trip. (R1, Exhibit 2, at 10). Flemings understood that in making these statements she was taking a risk which could result in getting her into trouble. (R1, Exhibit 2, at 14 & at 15).

Lucco informed the prosecution of the videotape and offered to provide a copy for their examination. Lucco also offered the prosecution the opportunity to question Flemings at his office after viewing the tape. On September 13, 1995, seven days after the taping, Special Drug Enforcement Agent, Alan Wilson, interrogated Flemings. Wilson had previously been given access to the videotape and had presumably viewed it before the interrogation. According to Wilson's notes of the interrogation (A-34), Flemings not only made previous trips to Chicago for Williams, but received $10,000 from the first trip—the currency coming, in some instances, from William's socks—and $5,000 for the second trip. The notes also reflect that Williams called her again in January 1995 and told her that he needed her to make

another trip. She made the arrangements, and stated that she had previously booked an unrelated flight to Chicago for Stribling.

Wilson's notes reflect that after Thanksgiving in 1994, Williams gave Flemings' five year-old daughter $500.00 for her birthday. Within a week, Flemings and Paris made their second trip to Chicago with $300.00 in gas money provided by Williams. Flemings' other brother, Angelo Flemings, came down from Detroit and questioned her about Mr. Williams.

At trial, Lucco offered into evidence as Defendant's Exhibits #17, #18 and #20 the videotape, written transcript of the video by the court reporter and Wilson's notes. As further corroboration, Lucco stated that he would offer testimony of Angelo Flemings, who had met Williams in Chicago after Rachele's second trip. (Tr. Vol. VI, 138). Lucco offered to admit either or both exhibits under Federal Rule 804(b)(3) as statements made against her penal interest. He noted that Rachele had incriminated herself by giving statements to Agents Williams and Wilson on January 12, 1995 (Defendant's Exhibit #19) and then on September 13, 1995, giving contradictory statements to Wilson - a violation of 18 USC §1001 (1997). (Tr. Vol. VI, 126).

Mr. Porter, U.S. Attorney, objected to the presentation of the tape and/or transcript to the jury. (Tr. Vol. VI, 122). He found it significant that Lucco did not advise Flemings of her Miranda rights, although Flemings was not in custody and Lucco is not a law enforcement official. (Tr. Vol. VI, 123-125). Porter expressed concern that he had not been allowed to cross-examine Flemings. (Tr. Vol. VI, 125). Yet, Porter knew that Wilson was scheduled to interview Flemings, and that Wilson had been provided a copy of Flemings' statement prior to their September 13, 1995 interview . (Tr. Vol. VI, 82, 126).

Porter made it clear that Flemings' decision to give the videotape statements put her in danger of criminal prosection: "This woman, Your Honor—and I want to make this very clear—through probably a professional error on my part wasn't charged, and she still stands a good chance of being charged in this case." (Tr. Vol. VI, 9).

Porter advised that in his opinion Flemings had given materially different and false statements to a federal agent, thereby violating 18

USC §1001 (1997). (Tr. Vol. VI, 9). Later in the proceedings, Porter once again raised the threat of prosecution: "[W]hen we discussed Ms. Fleming's potential liability, I informed the Court that I believed that she was subject to a charge in the same indictment or with the same charges." (Tr. Vol. VI, 70). And again: "Judge, she's given....at least two varying statements to federal agents, statements such that I believe, based upon my experience, are false statements and in violation of the United States Code....she suffers from the possibility, since she's given an under oath statement on at least one occasion, she suffers from the possibility of being charged with perjury." (Tr. Vol. VI, 71).

The Court denied admission of Exhibits #17 and #18 (Tr. Vol. VI, 128, 130) and stated:

> Ms. Flemings, far from admitting that she committed a crime, she denies that she committed a crime. . . . If we permit this type of testimony, the dangers of it are obvious. Anytime we've got two people involved in a crime, we can have one of them go to trial and say I didn't do it either. She's not at risk because she doesn't have to take the stand, and it's hearsay. I mean we let it through some statement. So she has no risk at all." (Judge Beatty, Tr. Vol. VI 129, 130).

Lucco stated his intention to call Agent Wilson to testify. (Tr. Vol. VI, 133). But, the Court precluded his testimony. (Tr. Vol. VI, 141. On October 6, 1995 the jury, without knowledge of Flemings' statements, returned a verdict of guilty against Stribling of knowingly and intentionally possessing with intent to distribute cocaine in violation of 21 U.S.C. Section 841(a)(1). (R2, at 1, 7 #49).

On December 8, 1995, Stribling filed a motion for a new trial, arguing, *inter alia*, that the trial court erred in denying the admission into evidence of a video tape made by Flemings. (R2, at 8 #58). Following a hearing on January 16, 1996, the trial court denied Stribling's motion for a new trial and sentenced her to 151 months of imprisonment, 5 years of supervised release, a $50 special assessment, and a $2,000 fine. (R2, at 9 #63). On January 19, 1996, Stribling filed a Notice of Appeal. (R2, at 9 #69).

B. On Appeal

On or about January 19, 1996, Charlotta Ransom, Stribling's daughter, asked Thomas J. Royce, Stribling's appellate counsel, when he would be contacting Lucco regarding the issue of the Flemings' videotape. (R1, Exhibit 1, par. 4). Royce explained that he was awaiting the trial transcripts. (R1, Exhibit 1, par. 4).

On January 26, the case was docketed with the court of appeals. (R1, Exhibit 3, at 2). The due date for Stribling's brief was March 6, 1996. (R1, Exhibit 3, at 2). On or about February 17, 1996, Ransom again mentioned the videotape issue, and Royce explained that he was still awaiting the trial transcripts. (R1, Exhibit 1, par. 5).

Royce did not file a brief or other motion by March 6. (R1, Exhibit 3, at 2). On March 29, the appellate court issued an order to show cause against Royce for failing to prosecute the appeal. (R1, Exhibit 3, at 2). After Royce's response to this order, the due date of this brief was extended to April 29. (R1, Exhibit 3, at 2-3). Neither Stribling nor Ransom was told of the original due date or the extension.

In his April 3 letter, Royce notified Ransom of the April 29 due date and promised to forward her a draft by April 15, adding that he had "received the complete transcript and Record on Appeal." (R1, Exhibit 4). Royce did not provide Ransom with a draft by April 15. Indeed, the docket sheet reflects that the court record was not checked out by Royce until April 19. (R1, Exhibit 5, at 10).

Ransom finally received a "draft" of the brief on April 29, the brief due date. (R1, Exhibit 1, par. 9). This was not a "draft" as the docket sheet reflects that the brief was filed on that date. (R1, Exhibit 3, at 3). Upon reading the brief, Ransom saw that Royce had not raised the Flemings' videotape issue. (R1, Exhibit 6). She immediately called and expressed her concern to Royce. (R1, Exhibit 1, par. 9). Royce assured her that this issue would be brought out. (R1, Exhibit 1, par. 19).

On April 30, one day after filing the appellate brief, Royce wrote that he would file the brief on Monday after Ransom had reviewed it. (R1, Exhibit 7). He further wrote that he would argue the videotape issue in a reply brief and at oral argument. (R1, Exhibit 7). No reply

brief was ever filed. (R1, Exhibit 3). Royce nevertheless agreed that "all issues should be presented" and promised a "full venting" of the videotape issue at oral argument. (R1, Exhibit 7).

On August 2, Ransom telephoned Royce about making arrangements to attend oral argument. Royce told Ransom that oral argument had been cancelled. (R1, Exhibit 1, par. 19). Oral argument was heard on August 6. (R1, Exhibit 3, at 3). Royce unsuccessfully argued two issues: (1) propriety of the pretextual stop; and (2) sufficiency of the evidence. He did not argue the issue of the admissibility of the videotape. The Court found that *Whren vs. United States.* was clearly controlling and the initial traffic stop was consequently proper.[1] The Court also found that the government had proved its case beyond a reasonable doubt.[2] On August 26, 1996, the Appeals Court affirmed Stribling's conviction and sentence.[3]

When Ransom again asked about oral argument, Mr. Royce said that the court had made its decision without oral argument. (R1, Exhibit 1, par. 22). In a letter dated August 30, Royce stated that he would be filing for a rehearing en banc. (R1, Exhibit 9). On or about September 3, Royce told Ransom that he had filed for an en banc hearing. (R1, Exhibit 1, par. 22). Later, he explained that no hearing had been set because one of the judges was on vacation. (R1, Exhibit 1, par. 23). No motion for rehearing was ever filed. He then indicated that he was preparing a petition for certiorari and later promised to send a copy for her review. (R1, Exhibit 1, par. 25). No writ of certiorari was ever filed.

C. On §2255 Appeal

On August 22, 1997, Stribling filed a motion under 28 U.S.C. §2255 to vacate, set aside, or correct her sentence claiming ineffective assistance of appellate counsel. (R1). On October 30, 1997, the trial court denied Stribling's §2255 request. (R11, at 1 & R12). On

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[1] *See United States v. Stribling*, 94 F. 3d 321, 323 (7th Cir. 1996); *Whren v. United States*, 517 U.S. 806 (1996).

[2] *See Stribling*, 94 F.3d at 324-325.

[3] *See United States v. Stribling*, 94 F.3d 321 (7th Cir. 1996).

November 18, 1997, Stribling filed in the trial court a Notice of Appeal (R13) and a Motion for Certificate of Appealability (R14) which was granted On December 1, 1997. (R 15, at 2)

On May 13, 1998, the 7th Circuit Court affirmed the District Court's denial of Stribling's §2255 Motion. (A-1). The Court found that the trial court's decision to exclude the Flemings evidence was legally sufficient. The court stated that:

> As articulated in the district court opinion, the Statements were not against penal interest. Flemings did not admit to anything criminal. Nowhere did she so far tend to subject herself to criminal liability such that we can be confident in the veracity of her comments. In fact, Flemings continuously asserted that she and Stribling were innocent. (A-1, at 3).

The court found that because the trial court's decision to exclude the evidence was legally sufficient, the District Court reasonably concluded that Stribling suffered no prejudice from appellate counsel's failure to raise a moot evidentiary issue, and, therefore, Stribling had received effective assistance of appellate counsel. (A-1, at 3). After the 7th Circuit's denial of Stribling's §2255 motion, Stribling filed this Petition for Writ of Certiorari within the 90-day time limit set by Supreme Court Rule 13.1.

REASONS FOR GRANTING THE WRIT

ARGUMENT I

DID THE DISTRICT AND APPEALS COURTS ABUSE THEIR DISCRETION AND COMMIT REVERSIBLE ERROR IN FINDING THAT RACHELE FLEMINGS' VIDEO TESTIMONY WAS NOT ADMISSIBLE UNDER FEDERAL RULE OF EVIDENCE 804(b)(3) AS A STATEMENT AGAINST PENAL INTEREST?

"One man's word is no man's word;
we should quietly hear both sides."[4]

Rule 804 (b) (3), a hearsay rule, is premised on the view that out-of-court statements are inherently less reliable than those made in court. The declarant could lie or could have misperceived the events about which he is speaking; his statements could be misunderstood or taken out of context. But, "... some kinds of out-of-court statements are less subject to these dangers, and are therefore exempt from the general rule that hearsay is inadmissible."[5] Among these exceptions are statements made against the declarant's interest.[6]

In Stribling, the District Court stated in its October 30, 1997 Order that Stribling:

> Could have prevailed in showing that the videotape should have been admitted only if she had satisfied the following three-part test: (1) Flemings must have been unavailable as a witness; (2) Flemings' statement must have been against her penal interest; and (3) There must have been corroborating circumstances which clearly indicate the trustworthiness of Flemings' statements. (R11, at 7).

Flemings met the first requirement of the tri-part test when she invoked her Fifth Amendment privilege and refused to testify at Stribling's trial. She was therefore unavailable as a witness. Porter, conceded this fact on the record. (Vol. VI, 122-123).

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[4] Johann Wolfgang von Goethe.

[5] *Williamson v. United States*, 512 U.S. 594, 598 (1994).

[6] *See id.* at 598-599.

A. Did the courts below apply the wrong standard in holding that Rachele Flemings' videotaped statements were not against her penal interest?

Under 804(b)(3), a statement is against the declarant's penal interest when, under the circumstances, "a reasonable person in the declarant's position would not have made the statement unless believing it to be true."[7] According to *Williamson v. United States*, a statement need not be a confession to a crime to be against interest. When determining whether a statement is against interest, the court must view the statement in the context in which it was made, and view each statement individually.

The District and Appeals Courts applied the wrong standard in resolving the issues in the Stribling case. This fact is obvious when comparing the Supreme Court's statements in *Williamson* to those of the Courts in the Stribling matter. For example:

1. On the issue of whether a statement must be an admission of guilt to qualify as a statement against interest:

> *Williamson* stated: Even statements that are, on their face, neutral may actually be against the declarant's interest. "I hid the gun in Joe's apartment" may not be a confession of a crime; but if it is likely to help the police find the murder weapon, then it is certainly self-inculpatory. "Sam and I went to Joe's house" might be against the declarant's interest if a reasonable person in the declarant's shoes would realize that being linked to Joe and Sam would implicate the declarant in Joe and Sam's conspiracy. And other statements that give the police significant details about the crime may also, depending on the situation, be against the declarant's interest."[8]
>
> The District Court stated: [T]his statement has to be an admission that [the declarant] did something that was a crime . . [for example] I murdered somebody, I stole money from the bank .... (Tr. Vol. VI, 129).

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[7] Fed.R.Evid. 804(b)(3).

[8] *Williamson*, 512 U.S. at 603-04.

The Seventh Circuit stated: As articulated in the district court opinion, the statements were not against penal interest; Flemings did not admit to anything criminal. (A-1, at 3).

2. On the issue of whether a declarant's statement must be viewed in the context in which it was made:

Williamson stated: Whether a statement is self-inculpatory or not can only be determined by viewing it in context . . . . [W]hether a statement was sufficiently against the declarant's penal interest . . . can only be answered in light of all the surrounding circumstances.[9]

The District Court stated: I think we have to look at this statement by itself . . . . I don't think we can qualify that by saying, well, this statement by itself did not involve him in any criminal activity, but this statement may subject him to criminal liability if we look at it in the context of some other statement . . . . (Tr. Vol. VI, 129).

3. On the issue of whether each statement should be analyzed separately to determine whether it is against the declarant's penal interest:

Williamson instructed the courts to: 'Inquire[] whether each of the statements [sought to be introduced] was truly self-inculpatory . . . .' This can be a fact-intensive inquiry, which . . . require[s] careful examination of all the circumstances surrounding the criminal activity involved . . . ."[10]

The District and Appellate Courts: Failed to separately analyze each statement sought to be introduced to determine whether it was against the declarant's penal interest. (A-1; Tr. Vol. I-VIII).

Neither the District Court's statements nor the 7th Circuit's Order denying Stribling's §2255 appeal ever mentioned *Williamson*. (A-1; Vol. I - VIII). Instead, the Courts contravened *Williamson*, requiring a confession of guilt as a prerequisite to admissibility as a statement against penal interest. (Tr., Vol. VI, at 129-130; A-1, at 3). They also

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[9] *Id.* at 603-604.

[10] *Id.* at 604.

viewed Flemings' statements in isolation, specifically refusing to consider their surrounding circumstances. (Tr. Vol. VI, at 129). Furthermore, the Courts neglected to consider each of Flemings' statements individually to determine whether they were against penal interest. (A-1; Tr. Vol. I-VIII).

The Courts' errors did not merely involve judgments left to their discretion, but constituted the judicially mandated means by which they reached their decisions. The Courts measured Flemings' statements according to the wrong yardstick; therefore, their decisions were erroneous.

Statements which, "[o]ut of context, . . . would not alone be against . . . penal interest" are often against penal interest when viewed in conjunction with all the surrounding circumstances.[11] Such is the case with Flemings' statements. When viewed in light of the circumstances in which they were given, Flemings' statements were against her penal interest according to *Williamson* and applicable Seventh Circuit precedent.[12] Had the Seventh Circuit applied the proper standard in determining whether Flemings' statements were against her penal interest, her statements would have been admitted.

According to established Seventh Circuit precedent, a statement is against the declarant's penal interest "if it would be probative in trial against the declarant."[13] Other circuits have also acknowledged that a statement need not be a confession or "make the difference between guilty and not guilty" to be against penal interest.[14] Prior to *Williamson*, some circuits applied extremely stringent requirements for a statement to be deemed against penal interest.[15] However, *Williamson*

[11] *United States v. Benveniste*, 564 F.2d 335, 341 (9th Cir. 1977).

[12] *See Williamson*, 512 U.S. at 603-604; *United States v. Garcia*, 897 F.2d 1413, 1420 (7th Cir. 1990).

[13] *United States v. Nagib*, 56 F.3d 798, 804 (7th Cir. 1995).

[14] *See United States v. Paguio*, 114 F.3d 928, 933 (9th Cir. 1997); *United States v. Alvarez*, 584 F.2d 694, 699 (5th Cir. 1978); *United States v. Satterfield*, 572 F.2d 687, 691 (9th Cir. 1978); *United States v. Thomas*, 571 F.2d 285, 288 (5th Cir. 1978); *United States v. Barrett*, 539 F.2d 244, 251 (1st Cir. 1976).

[15] *See United States v. Layton*, 549 F. Supp. 903, 919 (D. C. Cal. 1982) *see also United States v. Oropeza*, 564 F.2d 316, 324 (9th Cir. 1977); *United States v. Hoyos*, 573 F.2d 1111, 1115 (9th Cir. 1978).

established that statements need not amount to admissions of guilt or be sufficient evidence to warrant conviction to be against penal interest.[16]

Flemings subjected herself to penal liability in two distinct ways:

(1) Flemings revealed that she, not Stribling, had arranged the trip and that Williams had paid her extravagant sums for making similar trips, thereby implicating herself for cocaine possession.

(2) Flemings made statements under oath in the video, and in speaking to Wilson a second time, that clearly contradicted her earlier written statements to him, thereby subjecting herself to felony prosecution for making false statements under 18 U.S.C. § 1001 (1997).

Flemings' statements subjected her to liability for possession of cocaine, and were thereby sufficiently against her interest. In *United States v. Garcia*, a Seventh Circuit case, Garcia and Torres were arrested for transporting marijuana. Torres, exonerated Garcia, whom he said had nothing to do with his drug activities. Garcia also maintained his innocence and lack of involvement. At Garcia's trial, Torres invoked his Fifth Amendment privilege. The prosecution and defense agreed that all the statements in Torres' confession, *including the statement that Garcia was not involved in the crime*, were against Torres' penal interest. The parties' only point of contention regarding 804(b)(3) dealt with the existence of corroborating circumstances.[17] Similarly, in *United States v. Nagib*, a Seventh Circuit case decided after the *Williamson* decision, the court held that each statement in the confession of an alleged coconspirator, including statements that Nagib was innocent, was against the co-conspirator's penal interest.[18]

In *United States v. Thomas*, Thomas and several others were prosecuted for bank robbery. One of the defendants stated that "they ought to let [Thomas] go, he didn't have anything to do with it." The

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[16] See *Williamson*, 512 U.S. at 603.

[17] *United States v. Garcia*, 986 F.2d 1135, 1138-1139 (7th Cir. 1993).

[18] *See United States v. Nagib*, 56 F.3d 798, 803-05 (7th Cir. 1995).

court held that the statement was against interest because it "implie[d] that the declarant ha[d] knowledge of the crime, was inconsistent with [his] plea of not guilty and *would have probative value in the government's case against him*." Therefore, the court held that the statement fell within the "letter and rationale" of Rule 804(b)(3).[19]

In *United States v. Barrett*, Arthur Barrett was tried for the theft of postage stamps. Tilley, an alleged participant in the theft, stated Bucky (Barrett) wasn't involved. The appeals court held that the statement was against Tilley's penal interest, and overruled the trial court's judgment excluding it.[20] The court found that:

> A reasonable person would have realized that remarks of the sort attributed to Tilley strongly implied his personal participation in the stamp crimes and hence would tend to subject him to criminal liability. *Though by no means conclusive, the statement would be important evidence against Tilley were he himself on trial for the stamp crimes*. We cannot say, therefore, that it did not pose the sort of threat to Tilley's interest that the hearsay exception contemplates.[21] (Emphasis added).

In *United States v. Paguio*, the defendants, a husband and wife, were tried for making false statements to a bank. Their defense was that the husband's father had perpetrated the fraud, and the defendants lacked the requisite intent. The court held that the husband's father's statement that the husband had "nothing to do with" the crime was admissible as a declaration against interest. The court noted that a declarant's acceptance of "undiluted responsibility" increased the likelihood that the statement was true.[22]

Similarly, in *United States v. Doyle*, a case dealing with the illegal exportation of fuel pumps, the court acknowledged that the declarant's "assertions that he never informed [the defendant] of the identity of the ultimate purchaser [of the fuel pumps] did suggest that only he—not

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[19] *United States v. Thomas*, 571 F.2d 285, 287-289 (5th Cir. 1978).

[20] *United States v. Barrett*, 539 F.2d 244, 245 (1st Cir. 1976).

[21] *Id.* at 249-251.

[22] *United States v. Paguio*, 114 F.3d 928, 929, 932-934 (9th Cir. 1997).

[the defendant]—possessed the illegal intention to sell parts to Libya, and, thus, the statements could be characterized as inculpating [the declarant]." The statements, although they "tended to limit the illegal purpose to" the declarant, were not considered against the declarant's penal interest because, among other things, they were made under a proffer agreement guaranteeing that none of the declarant's statements would be used against him.[23]

In making the video, Flemings gave the government reason to reconsider its decision not to charge her. She admitted:

(1) That she made the arrangements with Williams to drive the car (R1, Exhibit 2, at 5);

(2) That she had twice been paid by Williams for previous trips to Chicago (R1, Exhibit 2, at 5-6, 9-10);

(3) That she had expected compensation for this trip, but Stribling was not to be paid by Williams for driving the car to Chicago (R1, Exhibit 2, at 9-10); and

(4) That Stribling had nothing to do with the arrangements to drive the car, and accompanied Flemings' on the trip only after Flemings invited her. (R1, Exhibit 2, at 11).

Flemings was aware that her statements could lead to criminal charges, and acknowledged as much on the video. (R1, Exhibit 2, at 14-15). The risk was real. The prosecutor, acknowledged Flemings' possible criminal liability and the consequences of her statements:

> This woman, Your Honor—and I want to make this very clear—through probably a professional error on my part wasn't charged, and she still stands a good chance of being charged in this case. (Tr. Vol. VI, at 9).

By admitting that she had made prior trips for Williams for over $15,000 compensation, Flemings, like the declarant in *Thomas*, clearly implied that she had knowledge of the crime, and her statements would be highly probative in the government's case against her. As in

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[23] *Id.* at 929.

Barrett, Flemings' statements strongly implied her participation in the crime and would be important evidence against Flemings at trial. Also, like the declarant in *Paguio*, Flemings accepted undiluted responsibility for planning and arranging her third car trip for Williams. Further, as in *Doyle*, Flemings statement, by revealing that Stribling played no part in the arrangement between Flemings and Williams to drive the car, "tended to limit the illegal purpose" to Flemings.

Stribling was convicted of the crime on much weaker evidence than Flemings offered against herself by making the videotape and speaking to Agent Wilson a second time. It is, therefore, ridiculous to suppose that Flemings' statements were not against her penal interest. Flemings' statements "pose the sort of threat to [the declarant's] interest that the hearsay exception contemplates,"[24] and fall "within the 'letter and rationale'" of 804(b)(3).[25] The Courts' exclusion of Flemings' statements, therefore, constituted an abuse of discretion.

In addition, many of Flemings' statements which Stribling sought to introduce at her trial directly contradicted the statements she made to Agent Wilson on the night she and Stribling were arrested. Flemings clearly violated 18 U.S.C. § 1001 (1997). The following illustrate Flemings' admission of making false statements:

> *Initial Statement to Agent Wilson after the Arrest* ("Wilson I"): (Tr. Vol. VI, at 135-139; A-32): *Ms. Stribling said she was going to drive to Chicago and I could ride with her then either catch a cheap flight to Michigan or have my brother come and get me.*
>
> Video Testimony taken on 9/6/95("Video"): (R1, Exhibit 2, at 5): Q – [W]ere the arrangements to use this car to come to Illinois made between you and Mr. Williams? A – Yes. Q – did Yvonne Stribling have anything to do with making the arrangements for this car? A – No.
>
> Q – Before you were asked by Mr. Williams to drive the car to Chicago in January, before that happened, had you made arrangements for Miss Stribling to fly to Chicago for business

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[24] *Barrett*, 539 F.2d at 251.

[25] *Thomas*, 571 F.2d at 289.

purposes? A – Yes. Q – And how many different times did you make those arrangements? A – Twice .... [W]hy did those plans for Miss Stribling to fly to Chicago get canceled? A – Well, we both were going to go. Q – Okay. A – but then *Clyde had called me at the office and asked if I would drive and of course I say yeah and so then I asked her if she wanted to drive with me.*

Agent Wilson's Notes taken After the Videotape("Wilson II") (Tr. Vol. VI, at 137-139, A-34-36): *RF cd YS got to her house and RF asked her if she wanted to go to Chicago with her – YS said yes because she was going there to meet CW anyway.*

Wilson I: [W]e went back to Ms. Stribling's house where there was a gold Lincoln parked in the driveway. We went into the house, made a pot of coffee for the trip and got into the Lincoln. Miss Stribling already had the keys.

Video: Clyde Williams gave me or called the office and told me that he was going to drop the car off at Miss — well, I told him that I was going to Miss Yvonne's house and that he was going to — he said that he would drop the car off there and leave the keys on the front driver's tire.

Wilson II: CW asked RF where she would be and RF said at YS house — CW said he would drop car off there and leave keys over tire which he did.

The statements made by Flemings contradicting her earlier statements constituted implicit admissions of guilt, and were clearly against her penal interest. The prosecutor acknowledged as much at Stribling's trial when he stated:

> [Flemings] has given, in our opinion, materially different and false statements to a federal agent, thereby committing yet another crime, a[n 18 U.S.C. §] 1001 violation. . ." (Tr. Vol. VI at 9).

In *Lowery v. Maryland*, David Lowery was convicted of first-degree murder. He filed a habeas corpus petition alleging that the prosecution knowingly utilized perjured testimony at his trial. In support of his petition, he advanced a sworn affidavit from a chief

witness for the state at his trial. In the affidavit, the witness stated that he testified falsely against Lowery at trial. The parties, like those in *Stribling*, did not dispute that the witness' statements subjected the witness to criminal liability. The court held that, because the witness' sworn statement, "if true, is an admission of perjury (assuming his testimony at the trial was willfully given), the affidavit constitutes a statement against penal interest." However, the evidence was excluded due to a failure to satisfy the corroboration prong of the tri-part test above.[26]

In *United States v. Goins*, Benjamin Goins was convicted of racketeering and other charges which included encouraging Joyce Harlston to give perjured testimony to the grand jury. The state introduced into evidence statements that Joyce made to her daughter and an off-duty policeman friend in which Joyce admitted that she had lied to the grand jury. The court held that the statements were admissible as statements against penal interest.[27]

Flemings' statements are more clearly against penal interest than the statements admitted in *Goins*. The statements in *Goins* were made in an informal environment to the declarant's daughter and friend, while Flemings' statements were made under oath and on videotape or directly to Agent Wilson, and were made for the purpose of being admitted at a criminal trial. Flemings' statements are not inculpatory on their face. When considered in light of the surrounding circumstances, those statements constitute implicit admissions of making false statements under 18 U.S.C. §1001 (1997). (R1, Exhibit 2, at 5-15). The fact that the admission of making false statements was implicit does not in any way render the admission less real or the criminal liability less certain than that of the declarants in *Lowery* and *Goins*. Prosecution and defense counsel agreed that Flemings implicitly admitted to a §1001 violation. (Tr. Vol. VI, at 9, 126). Flemings' statements were clearly against her penal interest and admissible under 804(b)(3). The District Court's judgment excluding them, therefore, constituted an abuse of discretion.

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[26] *Lowery v. Maryland*, 401 F. Supp. 604, 605 (D.C.Md. 1975).

[27] *United States v. Goins*, 593 F.2d 88, 89-91 (8th Cir. 1979).

B. Were corroborating circumstances present that clearly indicated the trustworthiness of Flemings' statements?

The third prong of the test for statements against interest requires the presence of corroborating circumstances that clearly indicate the trustworthiness of the statements.[28] No court has ruled on the issue of corroboration in Stribling's case. Therefore, the standard of review regarding corroboration is not abuse of discretion, but de novo.[29]

There is ample corroborating evidence clearly indicating the trustworthiness of the statements Flemings made on the video and in her second interview with Agent Wilson:

1) Flemings repeated the statements to others; Agent Wilson at the September 13 interview and her brother, Angelo Flemings. (Tr. Vol. VI, at 137-139; A-1; Tr. Vol. VI, at 138).

2) Angelo Flemings gave testimony at Stribling's trial corroborating Rachele's statements that she had made two prior trips to Chicago and Stribling had nothing to do with those trips. (Tr. Vol. VI, at 149-150).

3) Flemings acknowledged on tape that she could be charged with a crime, but she continued to give statements exculpating Ms. Stribling. (R1, Exhibit 2, at 14-15).

4) Prior arrangements had been made for Stribling to fly to Chicago, which were cancelled only when Flemings *invited* Stribling to accompany her on her drive to Chicago. (R1, Exhibit 2, at 10-11).

5) Flemings' statements on video were given under oath. (R1, Exhibit 2, at 1).

6) Flemings repeated the statements she made on the video in her subsequent interview with Agent Wilson.

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[28] See Fed.R.Evid. 804(b)(3).

[29] *See United States v. Thomas*, 571 F.2d 285, 290 (5th Cir. 1978).

7) Flemings' statements were not made while Flemings was in custody, and, therefore were not coerced by law enforcement officials. (R1, Exhibit 2, at 1, 5).

8) Flemings' statements were not a part of a plea bargain, and increased her criminal liability rather than decreasing it; therefore, they were not made to curry favor, shift blame, or make a "deal" with law enforcement.

In *Garcia*, the Seventh Circuit held that Torres' inculpatory statements were sufficiently corroborated. The court observed that 804(b)(3) does not require that the statements themselves be clearly corroborated. Rather, the corroboration requirement is "a preliminary question as the admissibility of evidence, not an ultimate determination as to the weight to be given to such evidence." The court need not be completely convinced that exculpatory statements are true, as such a high burden was not intended by the corroboration requirement. Instead, the court must admit the evidence if sufficient corroborating circumstances exist to permit the jury to make the ultimate determination concerning the statement's truth.[30]

The court in *Garcia* examined three factors to determine whether corroborating circumstances existed: "[1] the relationship between the confessing party and the exculpated party; [2] whether the confessor made a voluntary statement after being advised of his *Miranda* rights; [3] whether there is any evidence that the statement was made in order to curry favor with the authorities." The court held that, because the statements were inculpatory, were repeated on several occasions, the declarant and defendant were not close friends, the declarant made the statement after being Mirandized, and the statements were not made to "curry favor" with the authorities, the statements were sufficiently corroborated.[31]

The Seventh Circuit, in *United States v. Moore*, held that a statement lacked corroboration because it was later recanted at a court hearing; contradicted by the testimony of others; and unsworn.[32] In *United*

[30] *United States v. Garcia*, 986 F.2d 1135, 1140-41 (7th cir. 1993).

[31] *Id.*

[32] *See United States v. Moore*, 936 F.2d 1508, 1517-18 (7th Cir. 1991).

States v. Satterfield, the Ninth Circuit held that the fact that the statement was made spontaneously and the declarant expressed concern that he believed his statements to be against his penal interest indicated trustworthiness. The court found that, due to the substantial length of time (2 years) between the crimes and the statements and the fact that significant testimony contradicted the statements, they were not sufficiently corroborated.[33] In *United States v. Brainard*, the court held that, because the statements tended to inculpate the declarant, the declarant had no incentive to lie, and the statements were repeated on different occasions, the statements satisfied the corroboration requirement.[34]

In *United States v. Thomas*, the court found sufficient corroboration based on facts strikingly similar to Stribling's. In a statement regarding a bank robbery, the court held that, because Thomas did not assist in planning the robbery, another participant received money, while Thomas did not, and the declarant had no motive to make false statements and "incurred personal risk" by making them, 804(b)(3)'s corroboration requirement was satisfied.[35]

Flemings' statements are sufficiently corroborated to be admissible under 804(b)(3). Although Flemings was a friend of Stribling, her statements were repeated on two occasions: once on video, and once to Agent Wilson, and were not made to curry favor with the authorities. Although Flemings was not Mirandized, she gave her statements voluntarily in a non-custodial setting. She was therefore, presumably aware of her right not to speak. In contrast to the contradicted statements in *Moore*, Flemings' statements were corroborated: they were given under oath, were not recanted, and were not contradicted by any evidence or testimony.

Although Flemings did not make her statements spontaneously, she did indicate her awareness that her statements were against her penal interest. (R1, Exhibit 2, at 14-15). The lapse of time between the crime and Flemings' statements was only a matter of months, much less than

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[33] *United States v. Satterfield*, 572 F.2d 687, 693 (9th Cir. 1978).

[34] *United States v. Brainard*, 690 F.2d 1117, 1125 (4th Cir. 1982); see also *United States v. Barone*, 114 F.3d 1284, 1301 (1st Cir. 1997).

[35] *United States v. Thomas*, 571 F.2d 285, 290 (5th Cir. 1978)

the lapse of over two years in *Satterfield*, and Flemings' statements were corroborated by her brother, Angelo Flemings, and by information in her appointment book. (Tr. Vol. VI, 138, 492-498).

Like the defendant in *Thomas*, Stribling played no role in planning the events leading to the crime (R1, Exhibit 2, at 5) and, in contrast to Flemings, expected no money for the acts giving rise to the crime. (R1, Exhibit 2, at 10-11). Flemings, like the *Thomas* declarant, had no motive to falsify her statements, and subjected herself to personal risk by making them.

Flemings' statements satisfy 804(b)(3)'s corroboration requirement. They possess the requisite reliability to be worthy of the court's trust, and should be admitted into evidence.

C. Did the trial court's abuse of discretion in excluding Flemings' statements constitute reversible error?

Any error, if it "'does not affect substantial rights[,] shall be disregarded'" as "'harmless.'" In the Seventh Circuit, errors are harmless "[o]nly if we are convinced that the error did not influence the jury or had only a very slight effect, and can so say with fair assurance."[36]

In *Garcia*, the defendant, Garcia, was arrested because he was in a truck which, unknown to him, contained marijuana. Statements of Garcia's companion in the truck, which exculpated Garcia, were erroneously excluded by the trial court. Garcia's only defense was that he was not aware of the marijuana. The government's evidence of Garcia's knowledge was "rather thin," contained no direct evidence of knowledge and consisted mostly of inferences as to Garcia's intent. The court held that, if Garcia had been permitted to reinforce his testimony with the statements of his companion, the jury may have reached a different verdict. The court, therefore, held that the erroneous exclusion of the evidence, as it "had more than a slight effect on the jury's verdict," was not harmless, and reversed the judgment.[37]

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[36] *United States v. Zapata*, 871 F.2d 616, 622 (7th Cir. 1989) [citing Fed.R.Crim.P. 52(d)].

[37] *United States v. Garcia*, 986 F.2d 1135, 1136-41 (7th Cir. 1993).

In *Nagib*, out-of-court statements of a witness exculpating Nagib were excluded through an erroneous application of 804(b)(3). As in *Garcia*, Nagib's lack of knowledge of the drugs was his only defense, and the exclusion of the evidence impaired Nagib's ability to substantiate his claim of lack of knowledge. The court held the exclusion "may have affected the jury's verdict."[38] Similarly, in *United States v. Benveniste*, the court held that, since the prosecution's evidence was "not overwhelming," the inclusion of statements erroneously excluded under 804(b)(3) "might well have resulted in a different verdict."[39]

The car in which Stribling was travelling contained cocaine, and she voluntarily consented to the police search. (Tr. Vol. VI, at 173). Stribling's only defense was lack of knowledge. Stribling's only proof of her lack of knowledge, apart from her own testimony, was Flemings' statements. Those statements are powerful evidence of Stribling's lack of involvement in the crime. Their exclusion at trial kept crucial evidence from the jury and severely impaired Stribling's ability to substantiate her own testimony and prove her innocence. If Flemings' statements had been allowed to go to the jury, its verdict may well have been different. Therefore, the abuse of discretion that the District and Appeals Courts committed by excluding Flemings' statements was clearly not harmless, and the judgments below must be reversed.

ARGUMENT II

DID THE DISTRICT AND APPEALS COURTS ERR IN FINDING THAT YVONNE STRIBLING WAS NOT PREJUDICED BY APPELLATE COUNSEL'S LIES, MISREPRESENTATIONS AND INEFFECTIVE ASSISTANCE?

Stribling hired Thomas Royce as appellate counsel and conveyed to him the importance of Flemings' videotaped statements as the central issue in her appeal. (R1, Exhibit 1, Par. 1-3). Contrary to his promises, he never raised the issue during the appeal, and instead, argued two unpromising issues. (R1, Exhibits 1, 6, 7).

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[38] *Id.*

[39] *United States v. Benveniste*, 564 F.2d 335, 342 (9th Cir. 1977).

The Sixth Amendment to the Constitution, envisioning that counsel is crucial to the court's ability to produce just results,[40] entitles the defendant to effective assistance of counsel as of right both at trial and on direct appeal.[41]

Strickland v. Washington sets out a two-part test for determining counsel's ineffectiveness: (1) counsel's representation fell below an "objective standard of reasonableness," and, (2) this deficient representation rendered the proceedings "fundamentally unfair or making the results unreliable." In other words, counsel's conduct so undermined the proper functioning of the adversarial process that it cannot be relied upon to have produced the best result.[42]

A. Did appellate counsel's representation fall below an "objective standard of reasonableness"?

"The proper measure of attorney performance remains simply reasonableness under prevailing professional norms."[43] Although effective advocacy does not require an attorney to raise every non-frivolous issue, appellate counsel's choice of issues is not beyond scrutiny. Significant issues which could have been raised should be compared to those which were raised.[44]

The issues chosen by Royce were inferior. His challenge to the preemptive stop was, in light of the Supreme Court's decision in *Whren*, utterly hopeless.[45] His second argument—that the government had failed to prove guilt beyond a reasonable doubt—totals three pages and was readily dispatched by the Court.[46] Thus, the Seventh Circuit affirmed the trial court decision, and Stribling remains in prison.

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[40] *Strickland v. Washington*, 466 U.S. 668 (1984).

[41] *Sims v. United States*, 103 F.3d 133, 133 (7th Cir. 1996).

[42] *Strickland*, 466 U.S. at 688.

[43] *Id.* at 688.

[44] *Gray vs. Greer*, 800 F.2d 644, 646-47 (7th Cir. 1985).

[45] *Whren vs. United States*, 517 U.S. 806 (1996).

[46] *U.S. v. Stribling*, 94 F.3d 321, 324-325 (7th Cir. 1996).

The video should have been the key issue on appeal. This is evidenced by the extended discussion among the district court and counsel on the video's admission; both on and off the record, and before and after the judge viewed the tape. (Tr. Vol. VI, at 70-82 & 121-132). The issue was raised again in Stribling's motion for a new trial, which was accompanied by a detailed legal memorandum dedicated exclusively to the videotape issue. (R. on Direct Appeal 65).

The Seventh Circuit in *Mason* was convinced that the petitioner might well have won his appeal on a significant and obvious question of state law that his counsel failed to pursue. Therefore, the court concluded that the appeal was not fundamentally fair and that the resulting affirmance of the conviction was not reliable. Consequently, the Court gave the defendant a second chance at direct appellate review.[47]

Royce's actions parallel appellate counsel's performance in *Mason*. As in *Mason*, trial counsel voiced its objection at trial and highlighted and argued the critical issue in his post-trial motion, thereby laying the groundwork for the appeal. As in *Mason*, the issue neglected (the videotape) was as strong as one of the arguments raised on appeal (the suppression argument) and much stronger than the other (the reasonable doubt argument). As in *Mason*, appellate counsel had a strong case to make for the defendant on appeal that he did not make.[48] Stribling, therefore, should be given a second chance at a fair trial.

Appellate counsel's performance was deficient because the omission of the videotape issue was not only without legitimate strategic purpose, but also contrary to the express instructions of his client. Stribling insisted that the issue be raised, and although Royce repeatedly promised to argue it, he neither briefed nor argued the barring of this key piece of evidence to the appellate court. The court in *Strickland* clearly states:

> Counsel's function is to assist the defendant, . . .to advocate the defendant's cause and the more particular duties to consult with

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[47] *Mason v. Hanks*, 97 F.3d 887, 902 (7th Cir. 1996).

[48] *See id.* at 892.

> the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution. Counsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process.[49]

Royce breached this duty. He abandoned the most important claim in Yvonne's case. He lied to her. (R1, Exhibits 1, 3, 4, 6-8). He led her to believe he was respecting her intentions, and yet he secretly contravened them. (R1, Exhibits 1, 3-8). He purposely kept her in the dark about all important developments in her case, and what information he did give her was untrue. (R1, Exhibits 1, 3, 4, 6-8). Instead of advocating her cause, he hindered it.

An attorney who demonstrates such disregard for his client's interests should not be presumed to have determined which issues to raise with that level of care, skill and integrity reasonably expected of an attorney. The fact that the brief Royce submitted to the Seventh Circuit contained false certification, and was therefore incomplete and improper, is further evidence that Royce's behavior fell far below the standard reasonably expected of an attorney.[50]

The District and Appellate Courts' decisions denying Stribling's § 2255 claim were a direct result of their erroneous determination that Flemings' statements were not against her penal interest. The Seventh Circuit stated:

> Because the trial court's decision to exclude the evidence was legally sufficient, the district court reasonably concluded that Stribling suffered no prejudice from counsel's failure to raise the issue on appeal and correctly determined that Stribling received effective assistance of appellate counsel. (A-1, at 3).

Therefore, the Courts' determination that Royce effectively represented Stribling is erroneous and an abuse of their discretion.

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[49] *Strickland*, 466 U.S. 668, 688.

[50] *See United States v. Stribling*, 94 F.3d 321, 325 (7th Cir. 1996).

Stribling has met *Strickland*'s first prong—the reasonableness standard—because counsel's failure to raise the hearsay issue was not the result of a reasoned assessment of the merits. Nor, as the Seventh Circuit mused in *Mason*, could the omission be explained by any strategic decision by appellate counsel.[51]

Royce had a "strong case to make for [defendant] on appeal that he did not make."[52] Therefore, his representation of Stribling fell below the standard reasonably expected of attorneys, depriving her of her Sixth Amendment right to effective counsel.

B. Did appellate counsel, by lying, misrepresenting and pursuing only meritless issues, prejudice Stribling's right to a fair trial with reliable results?

The second prong of the *Strickland* test requires that Stribling prove that Royce's ineffective assistance prejudiced her by depriving her of a fair trial with reliable results.[53] When appellate counsel omits, without legitimate strategic purpose, "a significant and obvious issue," his performance is deficient. When that omitted issue "may have resulted in a reversal of the conviction, or an order for a new trial, the lack of effective assistance prejudicial."[54] The question then becomes, if counsel would have presented the issue to the appeals court, would it have resulted in a reversal of the conviction or an order for a new trial?[55] The evidence strongly supports a finding that it would.

In Stribling's case, the trial court erroneously kept from the jury the most powerful evidence of Stribling's innocence, Flemings' videotaped statements. Because of that exclusion, the jury found "beyond a reasonable doubt" that Stribling was guilty. (Tr. Vol. VIII, at 2-3). During the appeals process, Stribling was under the impression that Royce would raise the videotape issue because he continually assured her that he would. (R1, Exhibits 1, 7, 9). Because of Royce's

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[51] *Mason*, 97 F.3d at 894.

[52] *Id.* at 889.

[53] See *Strickland v. Washington*, 466 U.S. 668, 686 (1984).

[54] *Mason*, 97 F. 3d at 893.

[55] See *Strickland*, 446 U.S. at 682.

untruthful assurances, Stribling never moved to dismiss him as counsel and hire another who would have truthfully represented her interests and respected her wishes. Her choice of effective counsel was taken from her and her Sixth Amendment right abridged, and she remains in prison today because of that abridgement of her constitutional right.

There is a very real possibility that Stribling would have prevailed on the videotape argument had it been raised on appeal and analyzed according to the correct standard.[56] And, if the case had been remanded for a new trial and the jury allowed to view the video, there is a real possibility that it would have placed enough reasonable doubt in the minds of the jurors to lead them to acquit Stribling. Royce's lies, misrepresentations and ineffective assistance rendered Stribling's trial unfair and the affirmance of her conviction unreliable, thereby prejudicing her right to a fair trial. After all: "Justice is the firm and continuous desire to render to everyone that which is his due."[57]

CONCLUSION

For the foregoing reasons, Yvonne Stribling's petition for writ of certiorari should be granted.

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[56] *See Freeman v. Lane*, 962 F.2d 1252, 1258 (7th Cir. 1992).

[57] Justinian

APPENDIX

INDEX TO APPENDIX

Page

Appendix A
Decision of the Seventh Circuit Court of Appeals, February 27, 1998 ..... A-1

Appendix B
Memorandum and Order granting Appellant's certificate of appealability, December 1, 1997 ..... A-6

Appendix C
Judgment denying Appellant's 28 U.S.C. §2255 motion, October 30, 1997 ..... A-8

Appendix D
Memorandum and Order denying Appellant's 28 U.S.C. §2255 motion, October 30, 1997 ..... A-9

Appendix E
Published Opinion of the Seventh Circuit Court of Appeals, August 26, 1996 ..... A-18

Appendix F
Judgment of the Trial Court, February 29, 1996 ... A-25

Appendix G
Statement of Rachele Flemings to Federal Agents Wilson and Williams, January 12, 1995 (Defendant's Exhibit 19) A-32

Appendix H
Notes of Agent Wilson from his second interview with Rachele Flemings, September 13, 1995 (Defendant's Exhibit 20) A-34

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

No. 97-4102

Submitted February 27, 1998*
Decided May 13, 1998

Before

Hon. WILLIAM J. BAUER, *Circuit Judge*

Hon. DANIEL A. MANION, *Circuit Judge*

Hon. DIANE P. WOOD, *Circuit Judge*

YVONNE R. STRIBLING,
Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,
Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Illinois.

William J. Beaty,
Judge.

ORDER

Yvonne Stribling was convicted of knowingly and intentionally possessing cocaine with the intent to distribute, in violation

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* After an examination of the briefs and record, we have concluded that oral argument is unnecessary, and the appeal is submitted on the briefs and record. *See* Fed R. App. P. 34(a); Cir. R. 34(f).

of 21 U.S.C. § 841 (a)(1), and sentenced to 151 months imprisonment. The conviction was affirmed by this court. *United States v. Stribling*, 94 F.3d 321 (7th Cir. 1996). On August 22, 1997, Stribling filed a *pro se* petition under 28 U.S.C. § 2255 to vacate, set aside, or correct her sentence, claiming ineffective assistance of appellate counsel. On October 31, 1997, the district court denied the petition. Stribling then filed a motion for a certificate of appealability in the district court pursuant to 28 U.S.C. § 2253, which requires prisoners to secure a certificate of appealability as a condition to the appeal. On December 1, 1997, the court granted the certificate of appealability, and Stribling now appeals. On appeal, Stribling asserts that the district court erred in finding effective assistance of appellate counsel, arguing that: (1) Rachele Flemings' out-of-court statements were against penal interest and the trial court erred when it refused to admit them into evidence as an exception to the hearsay rule; and (2) appellate counsel's failure to raise this evidentiary issue prejudiced the outcome of the appeal and qualifies as ineffective assistance of counsel.

We assume a familiarity with the facts set forth in our previous opinion and do not restate them here. Our discussion of the facts is limited to those necessary for the resolution of the present appeal, and the relevant facts are as follows.

For unknown reasons which are not germane to the present appeal, Rachele Flemings was arrested under the same circumstances as Stribling, but was not charged with a crime. In preparing for trial, Stribling's attorney questioned Flemings about her association with and relationship to the defendant, and after being placed under oath, Flemings answered counsel's questions and gave a series of statements, which were videotaped, about the events that preceded their arrest. DEA Special Agent Alan Wilson subsequently reviewed Flemings' videotape testimony before he interrogated her, and during the interrogation, he took notes on Flemings' responses. However, at trial,

Flemings invoked her Fifth Amendment privilege and refused to testify. Trial counsel offered into evidence the videotape, the transcript of the videotape, and Agent Wilson's notes as statements against Flemings' penal interest, but the district court refused to admit the out-of-court statements into evidence. Thereafter, Stribling was convicted and sentenced to prison.

For her direct appeal, Stribling obtained new counsel, and the attorney raised two issues on appeal: (1) the sufficiency of the evidence, and (2) the propriety of the stop. However, appellate counsel did not raise the issue of the admissibility of the videotape, the transcript, or Agent Wilson's notes. After reviewing the issues presented, this court affirmed the conviction. Stribling renewed the evidentiary issue in her § 2255 petition, contending that: (1) Flemings' out-of-court statements are admissible under an exception to the hearsay rule; and (2) appellate counsel's failure to raise the issue qualifies as ineffective assistance, a violation of her Sixth Amendment rights. Notwithstanding Stribling's arguments, the district court determined that failure to appeal the trial court's evidentiary findings was not prejudicial and that appellate counsel rendered effective assistance and, therefore, denied the petition. Stribling then filed a motion for a certificate of appealability. The district court granted the certificate, and Stribling's appeal is properly before this court.

In reviewing the district court's denial of Stribling's § 2255 motion, we review all factual determinations for clear error and consider all questions of law *de novo Bond v. United States*, 77 F.3d 1009, 1012 (7th Cir. 1996). Relief may be available if Stribling can demonstrate flaws in her conviction or sentence "which are jurisdictional in nature, constitutional in magnitude, or result in a complete miscarriage of justice." *Doyer v. United States*, 55 F.3d 296, 298 (7th Cir. 1995). Stribling bears a heavy burden in overcoming the presumption that counsel rendered reasonably effective assistance. *Strickland v. Washington*, 466 U.S. 668, 689 (1984).

To establish a violation of the Sixth Amendment for ineffective assistance, Stribling must demonstrate that: (1) "counsel's representation fell below an objective standard of reasonableness;" and (2) "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 688, 694. We have repeatedly emphasized that appellate counsel need not advance every conceivable argument on appeal, and assistance of counsel is constitutionally ineffective only if counsel fails to raise issues that are "obvious" and "clearly stronger than the ones raised." *Kelly v. United States*, 29 F.3d 1107, 1112 (7th Cir. 1994).

To ultimately determine whether Stribling has a successful claim for ineffective assistance of counsel, at this point in our analysis, we must address Stribling's second contention. Stribling argues that: (1) Flemings' statements should have been admitted into evidence in some capacity, either the videotape, the transcript of the tape, or Agent Wilson's notes, because she was an unavailable declarant who made statements against penal interest; and (2) the district court erroneously concluded that the trial court's decision to exclude the evidence was not error.

We review a district court's rulings on the admissibility of evidence for an abuse of discretion. *United States v. Williams*, 31 F.3d 522, 527 (7th Cir. 1994). Rule 804(b) of the Federal Rules of Evidence allows certain hearsay statements of unavailable declarants into evidence. The district court applied the appropriate three-part test to determine the admissibility of Flemings' testimony, as an exception to the hearsay rule under Rule 804(b)(3). *See United States v. Garcia*, 986 F.2d 1135, (7th Cir. 1993). The court recognized that Flemings was unavailable as a witness, which satisfied the first prong of the test. However, the court remained convinced that her statements were not against penal interest and determined that appellate counsel also could have reasonably concluded that there was insufficient merit to pursue the issue.

In our review of the court's conclusion, we only discuss the "against penal interest" aspect of Flemings' statements to determine whether the admission of her testimony was warranted as exculpatory hearsay statements. The hearsay exception does not provide that any statement which "possibly could" or "maybe might" lead to criminal liability is admissible; on the contrary, only those statements that "so far tended to subject the declarant to civil or criminal liability . . . that a reasonable person in the declarant's position would not have made the statement unless believing it to be true" are admissible. Fed. R. Evid. 804(b)(3). In its review of the trial transcript and the record, the district court concluded that Flemings' testimony was not inculpatory and not against penal interest. Accordingly, the district court dismissed Stribling's petition because appellate counsel's failure to raise a moot evidentiary issue is not ineffective assistance.

We agree. In fact, appellate counsel was absolutely correct in his evaluation of Stribling's appeal; appealing the trial court's decision to exclude Flemings' statements would have been fruitless, because its decision to exclude Flemings' testimony was proper. As articulated in the district court opinion, the statements were not against penal interest; Fleming did not admit to anything criminal. Nowhere did she so far tend to subject herself to criminal liability such that we can be confident in the veracity of her comments. In fact, Flemings continuously asserted that she and Stribling were innocent. Because the trial court's decision to exclude the evidence was legally sufficient, the district court reasonably concluded that Stribling suffered no prejudice from counsel's failure to raise the issue on appeal and correctly determined that Stribling received effective assistance of appellate counsel.

After reviewing the district court memorandum opinion and order and the record on appeal and for the reasons stated herein in addition to those discussed in the district court's detailed opinion, we affirm the district court's denial of Stribling's § 2255 motion.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

CIVIL NO. 97-717-WLB
CRIMINAL NO. 95-30005-WLB

YVONNE R. STRIBLING,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

MEMORANDUM AND ORDER

[Filed: Dec. 1, 1997]

BEATTY, District Judge:

Before the Court is the petitioner's notice of appeal from the Order of this Court denying her motion under 28 U.S.C. § 2255 to vacate, set aside, or correct sentence. Also before the Court is the petitioner's motion for a certificate of appealability. Pursuant to 28 U.S.C. § 2253, the petitioner may not proceed on appeal without a certificate of appealability. Section 2253(c)(2) provides that a certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." Further, 2253(c)(3) provides that the certificate of appealability "shall indicate which specific issue or issues satisfy the showing required by paragraph (2)."

The standard for issuing a certificate of appealability is the same as had been in place for issuing a certificate of probable cause. *Herrera v. United States*, 96 F.3d 1010, 1012 (7th Cir. 1996), *reh'g denied*, 108 F.3d 1379 (7th Cir. 1997). The purpose behind the requirement of a certificate of probable cause was to help separate frivolous claims from potentially meritorious ones. *Barefoot v. Estelle*, 463 U.S. 880, 892-93, ___, *reh'g*

denied, 464 U.S. 874 (1983). The certificate was to be issued if the petitioner demonstrated that the issues were debatable among jurists of reason; that a court could resolve the issues in a different manner; or that the questions were adequate to deserve encouragement to proceed further. *Id.* at 893 n.4.

In the petitioner's § 2255 motion in the present case she argued that she had ineffective assistance of appellate counsel in that (1) appellate counsel failed to raise the best issue — the barring of the videotape — on appeal; and (2) appellate counsel engaged in a pattern of continual misrepresentations about the case thereby depriving her of the ability to properly evaluate his representation or to change lawyers. This Court excluded the videotape statements, finding that they were not against the declarant's penal interests and that there were no corroborating circumstances which would clearly indicate the trustworthiness of the declarant's statements. In reviewing the § 2255 motion, this Court remained convinced that its rulings were correct. Accordingly, this Court found that the petitioner had failed to show that there was a reasonable probability that the result would have been different had appellate counsel raised the videotape issue on appeal. Similarly, this Court found that petitioner had failed to show that she was prejudiced by appellate counsel's alleged misrepresentations. Accordingly, this Court denied the petitioner's § 2255 motion.

However, this Court can say that these issues are debatable among jurists of reason, that a court could resolve the issues in a different manner, and that the questions are adequate to deserve encouragement to proceed further. *See Barefoot*, 464 U.S. at 893 n.4. Accordingly, the petitioner's request for a certificate of appealability (Doc. #14) is GRANTED.

IT IS SO ORDERED.
DATED: 12-1-97

/s/ W.L. Beatty
DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

CIVIL NO. 97-717-WLB
CRIMINAL NO. 95-30005-WLB

YVONNE R. STRIBLING,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

JUDGMENT

[Filed: Oct. 30, 1997]

This action came before the Court for a ruling on Petitioner's motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255. The Court has rendered the following decision:

IT IS ORDERED AND ADJUDGED that the motion is DENIED, and this action is DISMISSED without prejudice. Judgment is entered in favor of Respondent and against Petitioner. Petitioner is to take nothing from this action.

NORBERT G. JAWORSKI,
CLERK

October 30, 1997
Date

By: /s/ Patricia A. Brown
Deputy Clerk

Approved: /s/ W.L. Beatty
District Judge

EOD: 10-31-97

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

CIVIL NO. 97-717-WLB
CRIMINAL NO. 95-30005-WLB

YVONNE R. STRIBLING,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

MEMORANDUM AND ORDER

[Filed: Oct. 30, 1997]

BEATTY, District Judge:

This matter is before the court on the Petitioner, Yvonne R. Stribling's, *pro se* motion under 28 U.S.C. § 2255 to vacate, set aside, or correct sentence (Doc. #1). Pursuant to Rule 4(b) of the Rules Governing Section 2255 Proceedings, the government has filed a written response to the motion (Doc. #8). The Petitioner has filed a reply to the government's response (Doc. #9). For the reasons set forth below, the motion is denied and the action is dismissed.

BACKGROUND

On September 6, 1995, Rachele Flemings made a series of statements on videotape to the Petitioner's trial counsel. The subject of these statements was a January 11, 1995, car trip Flemings and the Petitioner made together from California to Chicago which resulted in the seizure of some 30 kilograms of cocaine from their vehicle on an interstate in southern Illinois. Flemings was never charged with a crime, but on January 17, 1995, the Petitioner was charged in a one-count indictment with

knowingly and intentionally possessing with the intent to distribute cocaine in violation of 21 U.S.C. § 841(a)(1) (Doc. #5).

In the videotape, Flemings, after being placed under oath, began by explaining how she and the Petitioner had come to drive the car in which the cocaine was eventually discovered. Flemings stated that Clyde Williams had spoken with her over the phone and told her that he would drop the car off. Flemings explained that the arrangements to use the car to come to Illinois were made between her and Williams, and that the Petitioner had nothing to do with making the arrangements for the car. Flemings added that she had made two prior car trips from California to Chicago for Williams. Her brother, Paris, had accompanied her on these trips, and the Petitioner had not.

With respect to the trip in question, Flemings explained that Paris had been ill and could not make the trip. Flemings, therefore, asked the Petitioner to accompany her. Flemings explained that the Petitioner was going to Chicago anyway "for other business." Flemings said that neither she nor the Petitioner knew anything about what was in the car when she agreed to drive it from California to Chicago for Williams. She also said that when she put her luggage in the trunk of the car, she did not notice anything odd or unusual.

Flemings said that Williams never gave her any specific instructions on how to behave or on how to drive the car. He never told her that she should be careful or anything of that sort. He never told her what she should do if she was stopped by the police. He never gave her any reason to think that she was involved in some sort of illegal or dangerous activity. Flemings admitted that Williams had paid her for the two prior trips and that she had anticipated being paid for this trip. She said that the Petitioner was not supposed to be paid for making the trip.

In closing, Flemings said that she understood that she was taking a risk in making these statements, which could result in

her getting into trouble. However, she said that she had no reason to think that the car she was driving had anything in it. She said that if she had thought that the car had drugs in it, she would never have made the trip. She just thought that Williams was rich and generous. She also said that she had no reason to believe that the Petitioner knew anything about the trip except that she had asked the Petitioner to go along.

Later that afternoon, trial counsel informed the prosecutor of the videotape and offered to provide a copy for his examination. Trial counsel also offered the prosecutor the opportunity to question Flemings at his office after viewing the videotape.

On September 13, 1995, seven days after the videotaping, Special Agent Alan Wilson questioned Flemings at trial counsel's office. Agent Wilson had previously been given access to the videotape. According to Agent Wilson's notes of the questioning, Flemings not only made previous trips to Chicago for Williams, but received $10,000 for the first trip and $5,000 for the second trip. The notes also reflect that Williams called Flemings again in January 1995 and told her that he needed her to make a third trip. Flemings said that the arrangements were made through her, and that she had previously booked a flight to Chicago for the Petitioner, who was going to Chicago on other business.

On October 4, 1997, at the Petitioner's trial, Flemings invoked her Fifth Amendment privilege and refused to testify. The videotape, the written transcript of the videotape, and Agent Wilson's notes were offered into evidence by trial counsel. As further corroboration, trial counsel stated that he would offer testimony of Flemings' brother, Angelo, who had met Williams in Chicago after Flemings' second trip. Trial counsel offered to admit the exhibits under Federal Rule of Evidence 804(b)(3) as statements made against Flemings' penal interest. Trial counsel felt that if the statements were not against Flemings' penal interest, she should not be permitted to assert her right against

self-incrimination under the Fifth Amendment. He also noted that Flemings had previously given a statement to the government on January 12, 1995, and that by giving contradictory statements on September 6, 1995, she had incriminated herself by previously making a false statement to a federal agent, a violation of 18 U.S.C. § 1001. The prosecutor objected to the presentation of the tape and/or transcript for the jury. He found it significant that trial counsel did not advise Flemings of her *Miranda* rights. The prosecutor also expressed concern that he had not been allowed to cross-examine Flemings. This court denied admission of the videotape itself as well as the transcript of the videotape.

After the denial of admission of the videotape and the transcript of the videotape, defense counsel stated his intention to call Agent Wilson to testify regarding his questioning of Flemings on September 13, 1995. This court then granted the prosecutor's oral motion *in limine*, precluding this testimony (Doc. #46).

On October 6, 1995, the jury found the Petitioner guilty as charged (Doc. #49). On December 8, 1995, the Petitioner filed a motion for a new trial (Doc. #58), arguing, *inter alia*, that this court erred in denying the admission into evidence of the videotape. Following a hearing on January 16, 1996, this court denied the Petitioner's motion for a new trial (Doc. #64). On January 18, 1996, the Petitioner was sentenced to 151 months of imprisonment, 5 years of supervised release, a $50 special assessment, and a $2,000 fine (Doc. #66). On January 19, 1996, the Petitioner filed a notice of appeal (Doc. #69). On August 26, 1996, the United States Court of Appeals for the Seventh Circuit affirmed. *United States v. Stribling*, 94 F.3d 321 (7th Cir. 1996) (Doc. #72).

On August 22, 1997, the Petitioner filed the instant motion under 28 U.S.C. § 2255 to vacate, set aside, or correct sentence (Doc. #1). In her motion, the Petitioner argues that she had ineffective assistance of appellate counsel in that (1) appellate

counsel failed to raise the best issue — the barring of the videotape — on appeal; and (2) appellate counsel engaged in a pattern of continual misrepresentations about the case thereby depriving her of the ability to properly evaluate his representation or to change lawyers. The court finds that no evidentiary hearing is required and that the Petitioner's motion does not merit relief. Accordingly, pursuant to Rule 8(a) of the Rules Governing Section 2255 Proceedings, the court denies the Petitioner's motion to set aside, vacate, or correct sentence and dismisses the action.

DISCUSSION

In support of her motion, the Petitioner alleged the following facts. When the Petitioner hired appellate counsel in December 1995, she expressed her desire to challenge this court's decision not to admit the videotape. Although the Petitioner and her daughter continued to insist that this issue be raised on appeal, and although appellate counsel on numerous occasions promised to argue the issue, appellate counsel neither briefed nor argued the videotape issue to the appellate court. The Petitioner also alleged that appellate counsel made numerous misrepresentations as to the preparation of pleadings which were never filed.

In its response to the Petitioner's motion, the government first argues that this court is without jurisdiction to consider the issues raised by the Petitioner. In the Seventh Circuit, a claim for ineffective assistance of appellate counsel is properly brought before the district court by a motion under 28 U.S.C. § 2255. *Page v. United States*, 884 F.2d 300, 302 (7th Cir. 1989). This challenge constitutes a "collateral attack" on an existing criminal judgment. *Id.* As a result, so long as the appellate court has not already ruled and rejected a claim of ineffective assistance of appellate counsel, the district court may hear it as any other question under § 2255. *Id.* Should the district court determine that appellate counsel was ineffective, the court may either vacate and reenter the judgment of conviction, thereby allowing

a fresh appeal, or, in the alternative, order a new trial. *Id.* As the Seventh Circuit has not already ruled and rejected a claim of ineffective assistance of counsel in the present case, this claim was properly brought before this court by a motion under 28 U.S.C. § 2255. Accordingly, the court will address the merits of the Petitioner's motion.

The effectiveness of appellate counsel is judged according to the two-part test applied to trial counsel under *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Counsel is deemed ineffective where the defendant shows that (1) counsel's representation fell below an "objective standard of reasonableness," and (2) there is a reasonable probability that, but for counsel's professional errors, the result would have been different. *Id.* at 687-94. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* at 694.

Although effective advocacy does not require an attorney to raise every non-frivolous issue, an appellate counsel's choice of issues is not beyond scrutiny. *Mason v. Hanks*, 97 F.3d 887, 893 (7th Cir. 1996). When appellate counsel omits, without legitimate strategic purpose, "a significant and obvious issue," his performance will be deemed deficient. *Id.* When that omitted issue "may have resulted in a reversal of the conviction, or an order for a new trial," the court will deem the lack of effective assistance prejudicial. *Id.*

The Petitioner argues, as she did at trial and in her motion for a new trial, that the videotape statements fall under the "statements against interest" exception to the hearsay rule, and thus were admissible evidence. See Fed.R.Evid. 804(b)(3). The Petitioner argues that she had ineffective assistance of appellate counsel based on his failure to raise the videotape issue. She argues that she was prejudiced by appellate counsel's failure to raise this issue on appeal because there was a very real possibility that, had the issue been raised on appeal, she would have prevailed.

Appellate review of this issue would have been limited since evidentiary rulings are left to the discretion of the trial court. *United States v. Garcia*, 986 F.2d 1135, 1139 (7th Cir. 1993). A trial court's determination of the trustworthiness of an out-of-court statement will be upheld unless the finding is clearly erroneous. *Id.* Moreover, an appellate court will not reverse if an erroneous evidentiary ruling resulted only in harmless error. *Id.* With these principles in mind, the Court will once again consider whether the videotape statements fall within the ambit of Rule 804(b)(3).

Federal Rule of Evidence 804(b)(3) permits certain testimony to be admitted at trial if the declarant is unavailable as a witness:

> A statement which . . . at the time of its . . . so far tended to subject the declarant to . . . criminal liability . . . that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

Rule 804(b)(3) is founded on the notion that reasonable people tend not to make self-inculpatory statements unless they believe them to be true. *Williamson v. United States*, 512 U.S. 594, 599 (1994). However, the rule "does not allow admission of non-self-inculpatory statements, even if they are made within a broader narrative that is generally self-inculpatory." *Id.* at 600-01.

The Petitioner could have prevailed in showing that the videotape should have been admitted only if she had satisfied the following three-part test: (1) Flemings must have been unavailable as a witness; (2) Flemings' statements must have been against her penal interest; and (3) there must have been corrobo-

rating circumstances which clearly indicate the trustworthiness of Flemings' statements.

Both parties in the present case agree that the first prong of the test — that Flemings was unavailable as a witness — was satisfied. Flemings invoked her Fifth Amendment privilege and refused to testify at the Petitioner's trial. Thus, she was unavailable as a witness.

The parties disagree however, as to whether the second and third prongs of the test were satisfied. As to the second prong, the Petitioner argues that Flemings' statements were against her penal interest. She argues that many of Flemings' statements were not things that a reasonable person in her position would state unless they were true. Accordingly, she argues that this court improperly refused to admit the statements. The government responds that Flemings' statements were not against her penal interest.

After a careful review of the record, the court remains convinced that Flemings' statements were not against her penal interest. In her videotape statements and in her statements to Agent Wilson, Flemings did not admit her guilt in any way. Instead, she proclaimed her own innocence as well as that of the Petitioner. In addition, there were no corroborating circumstances which would clearly indicate the trustworthiness of her statements. The court remains convinced that its rulings, excluding the videotape, the transcript of the videotape, and the testimony of Agent Wilson as to Flemings' statements to him, were correct. Accordingly, the Petitioner has failed to show that there is a reasonable probability that the result would have been different had appellate counsel raised the videotape issue on appeal. See *Strickland*, 466 U.S. at 694.

The Petitioner also argues that she received ineffective assistance of counsel on appeal because appellate counsel continually misrepresented his actions in her case thereby preventing her

from properly evaluating his work as an advocate. The Petitioner alleges that although appellate counsel agreed as to the importance of the videotape and other issues, and in fact continually promised to raise them, he never raised them. The Petitioner also alleges that appellate counsel made numerous misrepresentations as to the preparation of pleadings which were never filed. The Petitioner, however, has failed to show that she was prejudiced by appellate counsel's alleged misrepresentations. See *Strickland*, 466 U.S. at 694.

CONCLUSION

Pursuant to Rule 8(a) of the Rules Governing Section 2255 Proceedings, the court finds, from the face of the motion, the government's response, the Petitioner's reply, and the prior proceedings, that the Petitioner is not entitled to relief under 28 U.S.C. § 2255. Accordingly, the Petitioner's motion to vacate, set aside, or correct sentence (Doc. #1) is denied and the action is dismissed.

Also before the court is the government's request for the court to inquire into counsel's potential conflict of interest (Doc. #7). After a careful review of the government's request (Doc. #7) and the Petitioner's reply (Doc. #10), the court is satisfied that it is not necessary to inquire further into counsel's potential conflict of interest. Accordingly, the government's request to do so is denied.

IT IS SO ORDERED.

DATED: 10-30-97

/s/ W.L. Beatty
DISTRICT JUDGE

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 96-1194

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

YVONNE STRIBLING,
Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Illinois.

No. 95 CR 30005

William L. Beatty, Judge.

Argued August 6, 1996.
Decided August 26, 1996.

Before BAUER, MANION, and DIANE P. WOOD, Circuit Judges.

BAUER, Circuit Judge.

Yvonne Stribling, contesting the district court's denial of her motion to suppress as well as the sufficiency of the evidence, appeals from her conviction of possession with intent to distribute approximately thirty kilograms of cocaine. We affirm.

BACKGROUND

Just before 9:00 a.m. January 11, 1995, on Interstate 55/70 in Madison County, Illinois, Trooper Rob Eisenbarger stopped two women in a Lincoln Continental for several traffic violations. Eisenbarger approached the vehicle and asked the driver, fifty-six-year-old accountant Yvonne Stribling, to show her driver's

license and the vehicle's paperwork. Stribling was asked to sit in Eisenbarger's car; there she told him that the car belonged to her brother, Kenneth Hughes, that her passenger had picked her up in Las Vegas, and that they were going to Chicago to visit the passenger's brother.

The passenger produced identification in the name Tammy Bell (although she was later identified as Rachele Leah Flemings). She said that Stribling had picked her up in Las Vegas and the purpose of the trip was to visit Flemings's brother in Michigan. She said she had known Stribling for approximately one year. Eisenbarger returned to his car and asked Stribling how she had acquired the Lincoln. Becoming increasingly nervous, she answered that she had picked the car up in California. She also stated that she had known Flemings for approximately three years. At this point, Eisenbarger used his squad car communications to discover that both women had prior arrest records.

Stribling returned to her car. Eisenbarger returned her paperwork to her, gave her a written warning, and told her that she was free to go. As Stribling turned to leave, Eisenbarger asked if he could ask a few more questions, and Stribling consented. Eisenbarger stated that it was his responsibility to be aware of persons transporting guns and drugs on the interstate highway system and asked Stribling if she had any guns. She replied no. Then he asked if she had any drugs. Stribling became agitated, but turned away and said no, they had nothing like that.

Eisenbarger asked permission to search Stribling's car. She signed a written consent form, which included permission to examine "any part, compartment, or trunk of the vehicle and the contents of any object or container found therein." When Eisenbarger opened the trunk, he noticed a strong smell of adhesive and became suspicious that the car contained a hidden compartment for carrying contraband. Unlike other cars, the trunk carpeting was glued down. After pulling it back, he found an unusual compartment built into the trunk which was con-

structed from fiberglass and sealed with adhesive. In the compartment, there were thirty bundles wrapped in gray duct tape and placed into plastic bags. One of the bundles field tested positive for cocaine. Stribling and Flemings were placed under arrest, read their *Miranda* warnings, and transported to police headquarters.

Before trial, Stribling moved to suppress the cocaine. She claimed that the stop was pretextual, that the subsequent search of the trunk was unlawful, and that the search was beyond the limited scope of her consent to search. The district court, after conducting an evidentiary hearing, denied the motion. The jury found Stribling guilty of violating 21 U.S.C. §. 841(a)(1).

ANALYSIS

A. Motion to Suppress

[1] [2] Although legal determinations of reasonable suspicion or probable cause are reviewed *de novo*, *Ornelas v. United States*, ___ U.S. ___, ___, 116 S. Ct. 1657, 1663, 134 L.Ed.2d 911 (1996), this court reviews for clear error the district court's findings of historical fact when denying a motion to suppress evidence. *Id.*; *United States v. Covarrubias*, 65 F.3d 1362, 1368 (7th Cir. 1995). Because the resolution of a motion to suppress is necessarily fact-specific, we give special deference to the district court that heard the testimony and observed the witnesses at the suppression hearing. *United States v. Navarro*, 90 F.3d 1245, 1251-52 (7th Cir. 1996).

Stribling contends that the original traffic stop was pretextual, that Eisenbarger had no probable cause to detain her after issuing her a written warning, and that she did not feel free to leave when he began asking her about guns and drugs and for permission to search the car. Thus, she asserts, her actions and statements took place in a custodial setting and her consent to search was involuntary and invalid. Further, she states that there was neither probable cause nor exigent circumstances to justify Eisenbarger's

search of her trunk, that her consent to do so was involuntary as obtained under duress, and that Eisenbarger's search exceeded the scope of her consent.

[3] *Whren v. United States*, ___ U.S. ___, 116 S. Ct. 1769, 135 L.Ed.2d 89 (1996), in which the Supreme Court held that ulterior motives do not invalidate a police stop for traffic or equipment violations, forecloses Stribling's argument that the traffic stop was a pretext for drug investigation. See *United States v. Murray*, 89 F.3d 459, 461 (7th Cir. 1996). Whether Eisenbarger was detailed primarily to drug enforcement is irrelevant: the initial traffic stop was supported by probable cause and consequently was proper.

[4] Stribling then consented, in writing, to allow Eisenbarger to search her car. She first argues that her consent was involuntary because she was effectively in custody and did not feel free to leave when Eisenbarger started asking her about guns and drugs. The parties agree that after Eisenbarger issued Stribling the warning he told her that she could depart, but asked her if she would answer a few more questions. "[T]he law is well established that if the officer asks rather than commands, the person accosted is not seized, and so the protections of the Fourth Amendment do not attach." *United States v. DeBerry*, 76 F.3d 884, 885 (7th Cir. 1996). Stribling was asked to remain and she chose to do so. See *United States v. Rivera*, 906 F.2d 319 (7th Cir. 1990); cf. *United States v. Finke*, 85 F.3d 1275 (7th Cir. 1996) (defendant would not feel free to leave after officer informed him that he was calling a canine unit).

Stribling next argues that the circumstances surrounding her consent indicate submission to authority rather than voluntariness. "Consent lifts the warrant requirement of the fourth amendment but only if the consent to search is voluntary." *United States v. Quinones-Sandoval*, 943 F.2d 771, 774 (7th Cir. 1991). "[T]he question whether a consent to search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a

question of fact to be determined from the totality of all the circumstances." *Schneckloth v. Bustamonte*, 412 U.S. 218, 227, 93 S.Ct. 2041, 2047-48, 36 L.Ed.2d 854 (1973). Under the factors enunciated in *United States v. LaGrone*, 43 F.3d 332, 334 (7th Cir. 1994) and *United States v. Kozinski*, 16 F.3d 795, 810 (7th Cir. 1994), neither the district court's finding that Stribling's consent was voluntary, nor its finding that Stribling consented to a search of "any compartment" of the car, can be considered clearly erroneous. See *Quinones-Sandoval*, 943 F.2d at 774-75.

[5] Because Stribling voluntarily consented to the search of the car, neither probable cause nor exigent circumstances was necessary for Eisenbarger to search the trunk legally. *Schneckloth*, 412 U.S. at 222, 93 S.Ct. at 2045. Further, as the district court noted, Stribling was present during the search; she could (and should) have protested at the time if she believed Eisenbarger exceeded the scope of her consent, as it was her burden to limit that scope. See *United States v. Price*, 54 F.3d 342, 346 (7th Cir. 1995); *United States v. Maldonado*, 38 F.3d 936, 941 (7th Cir. 1994), cert. denied, ___ U.S. ___, 116 S.Ct. 205, 133 L.Ed.2d 138 (1995).

B. Sufficiency of the Evidence

[6] In evaluating the sufficiency of the evidence, this court must determine "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979); *Covarrubias*, 65 F.3d at 1368; see *United States v. Meadows*, 91 F.3d 851, 854 (7th Cir. 1996).

[7] [8] To establish a violation of 21 U.S.C. §. 841(a)(1), possession of a controlled substance with intent to distribute, the government must prove beyond a reasonable doubt that Stribling: (1) knowingly or intentionally possessed cocaine; (2) possessed

it with the intent to distribute; and (3) knew it was a controlled substance. *Covarrubias*, 65 F.3d at 1369; *United States v. Windom*, 19 F.3d 1190, 1199 (7th Cir.), cert. denied, ___ U.S. ___, 115 S. Ct. 174, 130 L.Ed.2d 110 (1994). The government may use circumstantial evidence to show possession, where the evidence sufficiently demonstrates ownership, dominion, or control of an object. *Covarrubias*, 65 F.3d at 1369; *United States v. Hernandez*, 13 F.3d 248, 252 (7th Cir. 1994).

[9] In this case, the evidence, when viewed most favorably to the government, shows that Stribling, when stopped as part of legitimate traffic enforcement, was excessively nervous and became increasingly agitated when asked about drugs. When asked about routine matters such as her origination point, her destination, and her relationship to the car's owner, her answers were contradictory both to her previous statements and to the statements of her passenger. Additionally, rather than flying as she had originally planned, Stribling had driven across country to attend a business meeting, generally without stopping except for food and gas.

Further, after Stribling was arrested, she was paged, with the caller leaving a Chicago number that belonged to the hotel at which she planned to stay. She told police that she did not know who could be calling her, but agreed to cooperate with police, return the call, and explain that she would be delayed in arriving in Chicago because of a slight accident. While returning the call, however, she deviated from her instructions and repeatedly stated that the same thing that happened to "Pat" had happened to her; the caller (one of Stribling's clients, a Clyde Williams) left the hotel without checking out, went to O'Hare airport, and bought a one-way ticket to Los Angeles. Stribling acted surprised to find Williams on the phone, yet she testified that she was traveling to Chicago because she was scheduled to attend a meeting with Williams on January 11. Neither party mentioned this business meeting on the phone.

[10] The jury was entitled to infer from Stribling's nervousness and lies to the police, as well as the contradictory nature of her testimony and actions, that she knew of the presence and the nature of the cocaine. Further, it was entitled to infer from the amount of cocaine tested, fifteen kilograms, and the total amount of the substance found in the car, thirty kilograms, that the cocaine was not for personal use. Nothing more is required to rebut Stribling's argument. See *Covarrubias*, 65 F.3d at 1362.

C. Rule 30

Certification

In compliance with Circuit Rule 30(c), appellant's counsel certified that he had included in appellant's appendix all materials required by Circuit Rules 30(a) and 30(b). This was a false certification, as the appendix did not contain the transcript pages of the suppression hearing at which the district judge made findings of fact and explained his reasoning. Nor did the record, because the suppression hearing had never been fully transcribed. Neither party has offered an explanation for the incomplete record.

[11] We cannot imagine counsel might believe that we could review a denial of a motion to suppress without having an inkling of the district court's findings of fact or conclusions of law. In several recent decisions we have discussed the importance of proper compliance with Circuit Rule 30(a). See, e.g., *Hill v. Porter Mem. Hosp.*, 90 F.3d 220 (7th Cir. 1996); *Guentchev v. INS*, 77 F.3d 1036, 1038-39 (7th Cir. 1996). Counsel is advised to be aware of and comply with the rule's requirements, as future noncompliance may result in monetary sanctions. *In re Galvan*, 92 F.3d 582 (7th Cir. 1996)

AFFIRMED.

AO 245C (Rev. 3/95) Sheet 1 - Amended Judgment in a Criminal Case

FILED

(NOTE: Identify Changes with Asterisks (*))

United States District Court

FEB 29 1996

Southern District of Illinois

STUART J. O'HARE
CLERK U. S. DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS
EAST ST. LOUIS OFFICE

UNITED STATES OF AMERICA
v.
YVONNE RAY STRIBLING

AMENDED JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number: 3:95CR30005-001

Date of Original Judgment: 01/16/1996
(or Date of Last Amended Judgment)

William Lucco
Defendant's Attorney

Reason for Amendment:

- ☐ Correction of Sentence on Remand (Fed. R. Crim. P. 35(a))
- ☐ Reduction of Sentence for Changed Circumstances (Fed. R. Crim. P. 35(b))
- ☐ Correction of Sentence by Sentencing Court (Fed. R. Crim. P. 35(c))
- ☒ Correction of Sentence for Clerical Mistake (Fed. R. Crim. P. 36))
- ☐ Modification of Supervision Conditions (18 U.S.C. § 3563(c) or 3583(e))
- ☐ Modification of Imposed Term of Imprisonment for Extraordinary and Compelling Reasons (18 U.S.C. § 3582(c)(1))
- ☐ Modification of Imposed Term of Imprisonment for Retroactive Amendment(s) to the Sentencing Guidelines (18 U.S.C. § 3582(c)(2))
- ☐ Direct Motion to District Court Pursuant to ☐ 28 U.S.C. § 2255, ☐ 18 U.S.C. § 3559(c)(7), or ☐ Modification of Restitution Order

THE DEFENDANT:

- ☐ pleaded guilty to count(s) _____
- ☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.
- ☒ was found guilty on count(s) * 1 of the Indictment after a plea of not guilty.

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21 U.S.C. § 841 (a)(1)	Possession with intent to distribute cocaine	01/11/1995	Count 1

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

- ☐ The defendant has been found not guilty on count(s) _____
- ☐ Count(s) _____ (is)(are) dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 552-56-5942
Defendant's Date of Birth: 02/16/1939
Defendant's USM No.: 03269-025

Defendant's Residence Address:
19519 Branding Iron Road
Walnut CA 91789

Defendant's Mailing Address:
19519 Branding Iron Road
Walnut CA 91789

02/29/1996
Date of Imposition of Judgment

Signature of Judicial Officer

WILLIAM L. BEATTY
U.S. DISTRICT JUDGE
Name & Title of Judicial Officer

2/29/1996
Date

mn

BEST AVAILABLE COPY

DEFENDANT: YVONNE RAY STRIBLING

CASE NUMBER: 3:95CR30005-001

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 151 month(s).

☒ The court makes the following recommendations to the Bureau of Prisons:

That the defendant be placed in an institution close to Phoenix, Arizona

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ a.m./p.m. on _____.

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
Deputy U.S. Marshal

DEFENDANT: YVONNE RAY STRIBLING

CASE NUMBER: 3:95CR30005-001

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 5 year(s)

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

☐ The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

☒ The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check, if applicable.)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below) . The defendant shall also comply with the additional conditions on the attached page (if indicated below).

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: YVONNE RAY STRIBLING
CASE NUMBER: 3:95CR30005-001

PROBATION

The defendant is hereby placed on probation for a term of _____ .

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of placement on probation and at least two periodic drug tests thereafter, as directed by the probation officer.

☐ The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

☐ The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check, if applicable.)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of probation that the defendant pay any such fine or restitution in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below) . The defendant shall also comply with the additional conditions on the attached page (if indicated below).

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: YVONNE RAY STRIBLING

CASE NUMBER: 3:95CR30005-001

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Fine	Restitution
Totals:	$ 50.00	$ 2,000.00	$

☐ If applicable, restitution amount ordered pursuant to plea agreement . . . . . $ _____

FINE

The above fine includes costs of incarceration and/or supervision in the amount of $_____

The defendant shall pay interest on any fine of more than $2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

☒ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☒ The interest requirement is waived.

☐ The interest requirement is modified as follows:

RESTITUTION

☐ The determination of restitution is deferred in a case brought under Chapters 109A, 110, 110A and 113A of Title 18 for offenses committed on or after 09/13/1994, until _____. An Amended Judgment in a Criminal Case will be entered after such determination.

☐ The defendant shall make restitution to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below.

Name of Payee	** Total Amount of Loss	Amount of Restitution Ordered	Priority Order or Percentage of Payment
Totals:	$_____	$_____	

** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994.

DEFENDANT: YVONNE RAY STRIBLING

CASE NUMBER: 3:95CR30005-001

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A ☒ in full immediately; or

B ☐ $ _____ immediately, balance due (in accordance with C, D, or E); or

C ☐ not later than _____ ; or

D ☐ in installments to commence _____ day(s) after the date of this judgment. In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. probation officer shall pursue collection of the amount due, and shall request the court to establish a payment schedule if appropriate; or

E ☐ in _____ *(e.g. equal, weekly, monthly, quarterly)* installments of $ _____ over a period of _____ year(s) to commence _____ day(s) after the date of this judgment.

The National Fine Center will credit the defendant for all payments previously made toward any criminal monetary penalties imposed.

Special instructions regarding the payment of criminal monetary penalties:

The fine and special assessment are due immediately but may be paid from prison earnings or while the defendant is on supervised release.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

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Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments are to be made to the United States Courts National Fine Center, Administrative Office of the United States Courts, Washington, DC 20544, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program. If the National Fine Center is not operating in this district, all criminal monetary penalty payments are to be made as directed by the court, the probation officer, or the United States attorney.

DEFENDANT: YVONNE RAY STRIBLING

CASE NUMBER: 3:95CR30005-001

STATEMENT OF REASONS

☒ The court adopts the factual findings and guideline application in the presentence report.

OR

☐ The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

Guideline Range Determined by the Court:

Total Offense Level: 34

Criminal History Category: I

Imprisonment Range: 151 to 188 months

Supervised Release Range: _____ to 5 years

Fine Range: $ 2,000.00 to $ 4,000,000.00

☒ Fine waived or below the guideline range because of inability to pay.

Total Amount of Restitution: $ _____

☐ Restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweighs the need to provide restitution to any victims, pursuant to 18 U.S.C. § 3663(d).

☐ For offenses that require the total amount of loss to be stated, pursuant to Chapters 109A, 110, 110A, and 113A of Title 18, restitution is not ordered because the economic circumstances of the defendant do not allow for the payment of any amount of a restitution order, and do not allow for the payment of any or some portion of a restitution order in the foreseeable future under any reasonable schedule of payments.

☐ Partial restitution is ordered for the following reason(s):

☐ The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by the application of the guidelines.

OR

☒ The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

The sentence imposed is sufficient to punish the defendant for the crime committed, as well as serve as a deterrent to others.

OR

☐ The sentence departs from the guideline range:

☐ upon motion of the government, as a result of defendant's substantial assistance.

☐ for the following specific reason(s):

APPENDIX G

DEFENDANT'S EXHIBIT 19

STATEMENT

The following is a voluntary statement of Rachele Flemings furnished at U.S. Marshals Office, ESL, IL on January 12, 1995, at 3:00 p.m.

I, Rachele Flemings, make the following free and voluntary statement to S/A Alan Wilson and S/A Kenneth Williams, who have identified themselves to me as Agents of the Drug Enforcement Administration. I have been advised that I have the right to remain silent and that anything I say can be used against me in a court or other proceedings. I have the right to talk to an attorney for advise [sic] before I am asked any questions or make any statements and I have the right to have an attorney present with me during any questioning. If I cannot afford an attorney one will be appointed to represent me before any questioning if I wish. I have the right to stop questioning or making a statement at anytime for the purpose of consulting with an attorney. I fully understand my rights and state that no threats, force, or promises of rewards have been made to me in order to obtain this statement.

I met Yvonne Stribling approximately one year ago when I came to work for her at Char Consultants. I work as an Administrative Assistant. Ms. Stribling has several people working for her including her daughter "Chatter" Charletta Ransom. Ms. Stribling and I have become pretty close since we've known each other and I consider her like a play mother. At the beginning of January, I told Ms. Stribling that I wanted to fly to Michigan to see my brother before the tax season. Ms. Stribling said she was going to drive to Chicago and I could ride with her then either catch a cheap flight to Michigan or have my brother come and get me. On Monday, January 9, I went to work and Ms. Stribling said we would leave that night. We got dropped of at Chatters house and picked up Ms. Stribling's Rolls Royce. From there we went back to Ms. Stribling's house where there was a gold Lincoln parked in the driveway. We went into the house, made a pot of coffee for the

trip and got into the Lincoln. Ms. Stribling already had the keys. We left the Los Angeles area between 10:00-11:00 p.m. and drove to Las Vegas, NV. I asked Ms. Stribling whose car the Lincoln was, she said it was her brother, Kenny's. We got to Las Vegas about 2:00 a.m. and went to the Nevada Landing Hotel/Casino. We gambled and ate and got back on the road between 3:30-4:00 a.m. Ms. Stribling and I were together the whole time and she didn't meet with anyone. We drove non-stop from Las Vegas to Collinsville, IL where we were stopped by the police. The only time we stopped was for gas and to eat.

Ms. Stribling said she was going to Chicago to check out a recording business. I didn't know Clyde Williams had anything to do with this business. Clyde is Chatter's boyfriend although he is introduced as a friend of the family.

Patricia Hill is "Rabbit's" girlfriend. Rabbit is Laroyal Collins, one of Ms. Stribling's sons. Rabbit met Patricia at the drug rehab clinic. Rabbit got kicked out of that clinic because he was dealing drugs there. Ms. Stribling told me that Patricia had been in jail before but she didn't say what for.

I have read this statement consisting of 3 page(s) and have signed each page and initialed all corrections. This statement is true and correct to the best of my knowledge and belief. I have given this statement freely and voluntarily without threats, coercion, or promises

/s/ Rachele L. Flemings — 1/12/95
Signature — Date

Witnessed by:

/s/ S/A Alan Wilson

/s/ S/A Kenneth Williams

APPENDIX H

DEFENDANT'S EXHIBIT 20

Rachelle Flemings 9/13/95

— Spring 1994 — Clyde Williams asked RF if she would drive a car from Pamona, Ca. to Chicago.

— CW brought a car to her house — burgundy/red Lincoln — didn't tell here there was d. in the car — told her to drive the car to Chicago to the ITT-Sheraton downtown Chicago across from Fairmont Hotel — gave her $300 for g.

— RF and her brother Paris Fleming drove to Chicago

— She still didn't know there was d in the car — she didn't see any in the trunk

— When they got to Chicago, they met CW at the Sheraton where CW gave her a key to a room he had rented for her

*— have her find out exactly when this trip was

— spent 1 or 2 nights before flying home — had to pay for her own ticket

— CW gave her $10,000 for the first trip — CW was pulling money from everywhere — socks, brief cases, etc. — gave it to her in her room then never saw him again

*— Shortly after Thanksgiving 1994 — CW gave RF daughter $500 for her birthday on Nov. 20 — 5 yrs. old

— within one week of that time, she and her brother made a second trip to Chicago

— CW brought the same car to her and they drove to Chicago — gave her $300 for gas

- no instructions to call him only to go to the Fairmount Hotel in downtown Chicago — CW had a room for her
- he meets them and gives them to key to a room
  - thinks she registered there
  - have her check her phone records for that time
- CW talking about a production company
- RF met her brother from Detroit for breakfast who began asking her questions about CW — Angelo Fleming
- stayed 2 nites at Fairmount and flew home — paid her $5,000
- shortly thereafter — Angelo called Yvonne Stribling and told her he had set up a meeting bet. CW and his drummer friend — called YS because she was CW's business partner
- Jan. 1995 — CW called RF again and said he needed her to make another trip
- RF had previously made 2 reservations on NW for YS to fly to Chicago — didn't make the flights but RF can't recall the reason
- CW asked RF where she would be and RF said at YS house — CW said her would drop car off there and leave keys over tire which he did
- RF and YS got to her house and RF asked her if she wanted to go to Chicago with her — YS said yes because she was going there to meet w/ CW anyway
- leave Walnut enroute to Chicago — $300 for gas in the car — RF was to give him receipts and cash

- they went to Las Vegas and stayed a few hours and then got on the road again — didn't stop again until they got to Illinois
- this time they were to go to the Swiss Motel in Chicago in downtown
- RF had previously made reservations for YS at the same hotel for 2 or 3 days and put it on her (YS) credit card
- **Who is Kenneth Hughes — how would YS lying about him being her brother protect RF**
- when they were stopped by police in Ill., YS told RF to say she picked her up in Vegas and use her Nevada ID because she had a warrant from Calif. for speeding